

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 30803

KELLY JACKSON,

Plaintiff/Appellant,

vs.

**TIM JACKSON, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF STEVE JACKSON,**

Defendants/Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Jerauld County, South Dakota

The Honorable Patrick T. Pardy, Presiding Judge

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations to the settled record in this matter appear as “SR.” followed by the page number assigned by the Jerauld County Clerk of Courts in its indices. Plaintiff/Appellant, Kelly Jackson, will be referred to as “Kelly,” whereas Defendants/Appellees, Tim Jackson and Steve Jackson will be referred to as “Tim” and “Steve,” respectfully. Steve passed away during the pendency of this matter. (SR. 350). Tim became the Personal Representative of the Estate of Steve Jackson, and the case caption was amended accordingly. (*See* SR. 355). Any necessary distinction between Steve and the Estate of Steve Jackson for purposes of this appeal will be noted where appropriate.

Citations to the transcript of the bench trial held on January 22 – 23, 2024, will be denoted as “Tr.,” followed by the page and line numbers as they appear in the transcript. Exhibits introduced during the bench trial will be denoted as “Tr. Ex.,” followed by the exhibit number or letter. The Circuit Court’s Findings of Fact and Conclusions of Law, and Judgment, dated and filed on March 26, 2024, are included in the Appendix of this Brief at (Appellant Appx. 5-11), and will be cited as “Findings of Fact,” “Conclusions of Law,” and “Judgment,” as appropriate, followed by the corresponding paragraph number.

Citations to the transcript of the motions hearing held on February 27, 2018, will be denoted as “February Tr.,” followed by the page and line numbers as they appear in the transcript. The Trial Court’s Order dated March 17, 2018, following this hearing is included in the Appendix of this Brief at (Appellant Appx. 1-4), and will be referred to as the “2018 Order.”

Citations to the transcript of the motions hearing held on July 15, 2024, will be denoted as “July Tr.,” followed by the page and line numbers as they appear in the

transcript. Finally, the Trial Court's Order After July 15, 2024 Hearing dated August 17, 2024, is included in the Appendix of this Brief at (Appellant Appx. 16), and will be referred to as the "2024 Order."

JURISDICTIONAL STATEMENT

Kelly appeals from the Findings of Fact, Conclusions of Law, and Judgment, filed on March 26, 2024, in the matter numbered 36CIV17-000015, in the Third Judicial Circuit Court of South Dakota, the Honorable Patrick T. Pardy, presiding, following a bench trial concerning the winding down of the Jackson Brothers Partnership (the "Partnership"). This Court has jurisdiction pursuant to SDCL § 15-26A-3(1), as the Circuit Court's Judgment is the final adjudication of the rights of the parties. Notice of Entry of the Circuit Court's Findings of Fact, Conclusions of Law, and Order were given on July 15, 2024. (SR. 2984-2991). Kelly's Notice of Appeal was filed on August 13, 2024. (SR. 2991-92).

Kelly also appeals from the Circuit Court's 2018 Order, which concerns a pre-trial distribution of Partnership real estate, and the Circuit Court's 2024 Order, which concerns Kelly's post-Judgment enforcement efforts. This Court has jurisdiction pursuant to SDCL § 15-26A-7, as the 2018 Order and 2024 Order are determinations made before and after the Circuit Court's Judgment, and which involve the merits and necessarily affect the Judgment as appearing in the settled record.

STATEMENT OF THE ISSUES

- 1) Whether the Circuit Court abused its discretion when it distributed Partnership real estate to the parties without providing each party with an opportunity to purchase or otherwise obtain those properties?

The Circuit Court ordered that most of the Partnership's real estate would be distributed through a private auction of the parties. However, certain other parcels

of Partnership real estate were distributed by the Circuit Court without providing the parties with an opportunity to purchase or otherwise obtain those properties.

- *In re Dissolution of Midnight Star Enterprises, L.P. ex rel. Midnight Star Enterprises, Ltd.*, 2006 S.D. 98, 724 N.W.2d 334
 - *Priebe v. Priebe*, 1996 S.D. 136, 556 N.W.2d 78
 - SDCL § 48-7A-203
 - SDCL § 48-7A-501
- 2) Whether certain valuations made by the Circuit Court for Partnership assets are clearly erroneous?

The Circuit Court assigned values to certain Partnership assets following trial, including several valuations of \$0.

- *Priebe v. Priebe*, 1996 S.D. 136, 556 N.W.2d 78
 - *Eagle Ridge Ests. Homeowners Ass'n, Inc. v. Anderson*, 2013 S.D. 21, 827 N.W.2d 859
 - *FB & I Bldg. Prod., Inc. v. Superior Truss & Components, a Div. of Banks Lumber, Inc.*, 2007 S.D. 13, 727 N.W.2d 474
 - SDCL § 48-7A-401(b)
- 3) Whether the Circuit Court abused its discretion when it refused to allocate the costs associated with a forensic audit of the Partnership's records among the partners?

The Circuit Court held that Kelly was solely responsible for paying this expense.

- *In re Dissolution of Midnight Star Enterprises, L.P. ex rel. Midnight Star Enterprises, Ltd.*, 2006 S.D. 98, 724 N.W.2d 334
 - *Priebe v. Priebe*, 1996 S.D. 136, 556 N.W.2d 78
 - SDCL § 48-7A-401(b)
 - SDCL § 48-7A-401(h)
- 4) Whether the Circuit Court erred when it held that Kelly had no recourse in this proceeding to set-off or otherwise account for damages made by Tim and Steve to property Kelly purchased in the parties' private auction?

The Circuit Court held that any such damages were not properly part of this proceeding, and that such a claim for relief must be brought in a separate civil action.

- *In re Dissolution of Midnight Star Enterprises, L.P. ex rel. Midnight Star Enterprises, Ltd.*, 2006 S.D. 98, 724 N.W.2d 334
- *Burkhart v. Lillehaug*, 2003 S.D. 62, 664 N.W.2d 41
- *Coyote Flats, L.L.C. v. Sanborn Cnty. Comm'n*, 1999 S.D. 87, 596 N.W.2d 347

- SDCL § 48-7A-203

- 5) Whether the Circuit Court erred when it determined certain actions taken by Tim and Steve related to the removal or destruction of Partnership assets fell within the “ordinary course of business” provision of SDCL § 48-7A-401(j)?

The Circuit Court held that these actions were taken according to Partnership decisions that required only a majority vote of the partners to make.

- *Casey Ranch Ltd. P'ship (CRLP) v. Casey*, 2009 S.D. 88, 773 N.W.2d 816
- *Burkhart v. Lillehaug*, 2003 S.D. 62, 664 N.W.2d 41
- *In re National Steel Corp.*, 351 B.R. 906, 913 (N.D. Ill. 2006)
- *JTM Enterprises v. Oddello Indus., LLC*, 2023 WL 8281841 (Tenn. Ct. App. Nov. 30, 2023)

- SDCL § 48-7A-401(j)

- 11 U.S.C. § 547(c)(2)

- 6) Whether the Circuit Court erred when it denied Kelly’s post-Judgment motion to enforce a “cash default” provision that was negotiated in advance of the parties’ private auction?

The Circuit Court held that Kelly could not enforce the “cash default” provision.

- *Wichman v. Shabino*, 2014 S.D. 45, 851 N.W.2d 202
- *Cont'l Grain Co. v. Brandenburg*, 1998 S.D. 118, 587 N.W.2d 196

- SDCL § 15-6-58
- SDCL § 15-6-62(a)

STATEMENT OF THE CASE

Kelly appeals from three sets of rulings made by the Circuit Court during the course of this litigation: (1) the Circuit Court’s 2018 Order, wherein the Circuit Court distributed certain Partnership real estate prior to the parties’ private auction; (2) the Circuit Court’s Findings of Fact and Conclusions of Law, and Judgment, dated and filed

on March 26, 2024, wherein the Circuit Court issued several rulings following a court trial related to the valuation and distribution of Partnership assets; and (3) the 2024 Order, wherein the Circuit Court denied Kelly's post-Judgment motion to enforce a "cash default" provision stipulated to by the parties ahead of the private auction.

This case centers on the winding up of the Partnership, a South Dakota general partnership and farming operation, and claims asserted by the parties incidental thereto. Kelly filed suit against his two brothers, Tim and Steve, who were the other partners in the Partnership. (SR. 3-11). Kelly sought four grounds for relief: (1) a request for court supervision of the Partnership windup; (2) a claim for waste of the Partnership's assets; (3) a claim for conversion; and (4) a claim for tortious interference with business relationships. *See id.* Tim and Steve filed their Answer denying the claims asserted by Kelly and alleging certain claims of their own. (SR. 16-20). Kelly filed his Reply denying the counterclaims asserted by Tim and Steve. (SR. 77-79).

The case was tried before the Circuit Court on January 22 – 23, 2024. The parties stipulated to the Circuit Court's use of a "Trial Score Card" (or "Asset Sheet"), which the parties had prepared in advance of trial, and which identified the various Partnership assets at issue. *See* Tr. 14:9-17. A copy of the completed Trial Score Card accompanies the Circuit Court's Judgment as Exhibit 1, and is included in the Appendix of this Brief at (Appellant Appx. 12-15). At the end of trial, and after accounting for all Partnership assets being distributed to each partner, the Circuit Court concluded Kelly was entitled to an equalization payment of \$143,326.00. *See* Judgment. The Circuit Court's Findings of Fact and Conclusions of Law, and Judgment, were filed on March 26, 2024. Notice of Entry was given on July 15, 2024, (SR. 2984-2991), and Kelly's Notice of Appeal was

filed on August 13, 2024. (SR. 2992-93). Finally, with respect to the 2018 Order and the 2024 Order, these adjudications concerned certain pre- and post-trial motions filed by Kelly, which will be described in more detail below.

STATEMENT OF FACTS

Kelly has been farming for approximately fifty years. Tr. 68:13-14. He, along with his brothers Tim, Steve, and John Jackson, began farming together as partners in the early 1990s. Tr. 68:15-17; 69:6-7. Kelly and John were more heavily involved in the livestock aspect of the Partnership, whereas Tim and Steve were more heavily involved in its agricultural operations. Tr. 69:18-23; Tr. 72:22-73:4. John predeceased his other brothers prior to this litigation, *see* Tr. 71:9-12, and, as noted above, Steve is also now deceased. (SR. 350). In April 2017, Tim and Steve gave Kelly notice of their withdrawal from the Partnership. Tr. 73:5-8; Tr. Ex. 2.

Initially, the parties were able to reach partial agreements concerning the distribution of some Partnership livestock, machinery, and equipment. Tr. 75:2-10; Tr. Ex. 3; Tr. Ex. 4. However, the parties reached an impasse short of a complete resolution, and Kelly initiated this lawsuit for court supervision of the Partnership's windup and related matters via a certified Complaint dated August 24, 2017. (SR. 4-11).

There are a number of motions in the record, and for brevity only those specifically germane to this appeal will be discussed. For example, on November 30, 2017, Kelly filed a Motion for Appointment and Receiver and Liquidation of Partnership Property. (SR. 82-83). Among other things, Kelly requested the Partnership's real estate be distributed via a private auction among the partners, and also for authorization to conduct a forensic audit of the Partnership's accounts. (*Id.*).

The Circuit Court, in its 2018 Order, granted Kelly's requests for relief in part. First, and opposed to proceeding with a private auction, the Circuit Court on its own distributed certain Partnership real estate to each partner and directed the parties to have those parcels appraised. 2018 Order, § 4.a. The parties were permitted to present additional evidence and arguments in the event a party disagreed with the appraisal. *Id.* Second, the Circuit Court ordered the remaining Partnership real estate to be distributed via a private auction under terms set by the parties. *Id.*, ¶ 4.b. The winning auction values (or appraised values for the previously distributed real estate) for each partner would then be tracked and credited toward that partner's "column" of assets in order to ensure that each partner ultimately received 1/3 of the Partnership's assets at the end of the windup via a true-up or equalization payment. *Id.*, ¶ 4.d. Finally, with respect to the forensic audit, the Circuit Court permitted Kelly to have the audit conducted at his own expense. *Id.*, ¶ 3. The Circuit Court reserved ruling on whether to allocate the cost among the partners "based on the findings of the audit." *Id.*

As part of the 2018 Order, the Circuit Court granted leave for the parties to stipulate to the terms of the private auction. *See* 2018 Order, Ex. A(1). The parties negotiated and memorialized the terms of the private auction, which included a "cash default" provision. (*See* SR. 2864, Ex. B). This clause addressed the consequences of a partner's failure to make any equalization payment as ultimately ordered by the Circuit Court. Specifically, in that scenario, the parties agreed that the creditor partner could select a non-homestead parcel of real estate that had been distributed to the debtor partner, and to purchase that parcel at its tax assessed value. *Id.* The parcel shift (and its value) would then be accounted for in the true-up or equalization process. *Id.* In effect,

the value of the selected parcel would be deducted from the debt owed to the creditor partner. As proposed by counsel for Tim and Steve, this provision “should incentivize bidding within one’s budget and mobilizing capital between the auction and true-up.” *Id.*

The results of the private auction—*i.e.*, who received which parcel of real estate that had not already been distributed by the Circuit Court and the amount of the winning bid—are set forth in Trial Exhibit 5. *See* Tr. Ex. 5. These results and the properties at issue will be discussed in more detail in Section III.A., *infra*. As directed by the Circuit Court, the parties in April 2018 had the real estate that the Circuit Court distributed in advance of the private auction appraised. *See* Tr. Ex. D; Tr. Ex. E; Tr. Ex. F. These appraisals will also be discussed in more detail in Section III.A *infra*.

On October 8, 2018, Wieman Land & Auction conducted an appraisal of various Partnership assets, including its hay inventory. Tr. 122:20–123:2. The Wieman appraisal and inventory is set forth in Trial Exhibit 8. *See* Tr. Ex. 8. This appraisal was made roughly a year-and-a-half after Tim and Steve gave notice of their withdrawal from the Partnership, Tr. 123:3-4, and the Partnership’s hay from that time had been left out uncovered and exposed to the elements on property controlled by Tim and Steve. Tr. 123:14-24. There was also a significant amount of hay that could not be counted, which had been moved and/or sold by Tim and Steve after they provided notice of their withdrawal from the Partnership but before the Wieman appraisal. Tr. 126:19-127:6.

The case proceeded to a court trial, which was held on January 22 – 23, 2024. As noted, *supra*, the parties stipulated to the Circuit Court’s use of a “Trial Score Card” to assist with tracking the assets distributed to each partner, along with their values. *See* Tr. 14:9-14; Tr. Ex. 1 (Appellant Appx. 12-15). Several entries on the Trial Score Card were

stipulated to by the parties, with the Circuit Court deciding disputed values. At issue in this appeal are the entries for Lines 1 and 2 (related to Kelly's request to exchange the "Solberg" property he received at the private auction with the "Holtus" property purchased by Steve); Lines 14 and 15 (related to the values assigned to the real estate distributed to Tim and Steve in the 2018 Order); Line 18 (related to the quantity and value of the Partnership's hay inventory); Line 23 (related to the value assigned to equipment rent owed to the Partnership); Lines 30-33 (related to removed or destroyed Partnership assets, including a drainage ditch that was removed from the "Solberg" parcel after the private auction); Line 38 (related to the cost of the forensic audit); and Line 40 (related to certain Partnership expenses allocated to Kelly).

Several individuals testified at trial. Kelly's first witness was Eric Hansen of Eide Bailly, LLP, who is the forensic accountant hired by Kelly as contemplated by the 2018 Order. Tr. 18:6-10. Mr. Hansen testified that there was no physical inventory of the Partnership at the time of its dissolution, and so he used the best information available to "recreate what was produced, what was sold, and what the ending inventory should have been[.]" Tr. 27:11-16. In doing so, he compiled over 1,735 pages of documents concerning the Partnership's assets, its finances, expenses, and other records. Tr. 24:14-21; Tr. Ex. 17. Mr. Hansen also prepared an expert report in late 2018, *see* Tr. Ex. 18, and a supplemental report in April 2019. *See* Tr. Ex. 19.

Among other things, Mr. Hansen testified to the Partnership's inventories of commodities such as corn, oats, and soybeans. *See* Tr. 27:17-25. Mr. Hansen also created an inventory of these commodities beginning in 2014. Tr. 28:8-11. As part of that process, and again as a function of the Partnership's lack of records, Mr. Hansen created

two models based on whether the inventories began at full-capacity or half-capacity in order to then track the additions and subtractions of commodities through 2017, which is when Tim and Steve gave notice of their withdrawal. Tr. 29:24 – 31:7 (discussing his methodology with respect to these models). Mr. Hansen also accepted certain assumptions used by Tim’s and Steve’s expert, Roger DeRouche, so that both experts were using the same commodity storage capacities, production yields, and feed rates for the commodities fed to livestock. Tr. 32:5-9. As Mr. Hansen explained, the parties’ point of disagreement concerned the Partnership’s starting inventory. Tr. 32:10-12. The Circuit Court ultimately found Mr. Hansen’s testimony “to be the most credible” on the subject and adopted his half-full starting inventory model. Findings of Fact, ¶¶ 18-19.

Kelly also testified as a witness, and his testimony touches on most of the subjects at issue in this appeal. To avoid lengthy and unnecessary duplication, Kelly’s testimony as it relates to the appeal issues will be addressed in more detail in the sections that follow. *See infra*. Finally, Kelly also called non-party John Olinger, who is a neighbor and second cousin of Kelly, Tim, and Steve. Tr. 176:21 – 177:1. Mr. Olinger generally supported Kelly’s version of events on topics related to the Partnership’s commodity storage practices and capacity, Tr. 177:9-178:12, alterations made by Tim and Steve to Partnership real estate following the parties’ private auction, Tr. 178:13-180:20, the removal of certain Partnership fences by Tim and Steve, Tr. 180:21 – 182:4, and the Partnership’s hay inventory, Tr. 182:5 - 186:17. In opposition, Tim called himself as a witness, Tr. 191:11; along with his expert, Mr. DeRouche, Tr. 322:14. Tim also called his son Eric as a witness, Tr. 348:22, and his other son, Paul, Tr. 361:23; and the Partnership’s former accountant, Jonathan Guenthner, Tr. 375:13.

Following trial, the Circuit Court announced its ruling from the bench. *See* Tr. 396:3 – 405:5. The Circuit Court then issued Findings of Fact, Conclusions of Law, and its Judgment. As germane to this appeal, the Circuit Court denied Kelly’s request to substitute the “Solberg” property that he received following the private auction for the “Holtus” property purchased by Steve. Finding of Fact, ¶ 8. The Circuit Court then found that it would be inequitable to use the appraisal values for the parcels received by Tim and Steve as part of the 2018 Order. *Id.*, ¶¶ 9-14. Therefore, the Circuit Court re-evaluated and assigned new values to those properties. *Id.*, ¶¶ 12, 16-17. Next, and while the Circuit Court credited and adopted certain of Mr. Hansen’s testimony, *id.*, ¶¶ 19-20, the Circuit Court declined to apportion the costs of his forensic audit among the partners. *Id.*, ¶ 27.

The Circuit Court also disagreed with Kelly’s testimony and evidence presented concerning the amount of Partnership hay inventory. *Id.*, ¶ 23. The Circuit Court then found that the Partnership was not owed any rent from Tim and Steve for the period in 2017 following their withdrawal from the Partnership where they used Partnership equipment for personal purposes, *id.*, ¶ 24. The Circuit Court concluded that Tim’s and Steve’s decision to remove certain Partnership assets was a valid Partnership decision with only a majority vote required. *Id.*, ¶ 25. The Circuit Court also in particular found that Tim and Steve’s decision to remove a drainage ditch from the “Solberg” parcel was not a justiciable controversy in this litigation. *Id.*, ¶ 26. Finally, the Circuit Court determined that Kelly received approximately \$29,566 in value for various Partnership expenses, which were then assigned to him. *Id.*, ¶ 28. Ultimately, in light of all the Circuit Court’s findings at trial, the Circuit Court found Kelly was entitled to an

equalization payment of \$143,326.00. *Id.*, ¶ 31; Conclusion of Law, ¶ 10. The Circuit Court then entered its Judgment reflecting this award. *See* Judgment, ¶ 2.

On June 26, 2024, Kelly filed a motion to enforce the “cash default” provision from the parties’ private auction stipulation, as Tim and Steve had not made the required equalization payment at that time and more than thirty days had passed since entry of the Judgment. (SR. 2856). Tim and Steve subsequently tendered the equalization payment to Kelly. (*See* SR. 2924, Ex. B) (enclosing a copy of the check). On July 15, 2024, the Circuit Court heard arguments on Kelly’s motion, and then issued its ruling from the bench. *See* July Tr. 11:11. The Circuit Court denied Kelly’s motion and held that Kelly could not enforce the “cash default” clause. July Tr. 11:12-23.

Also on July 15, 2024, Notice of Entry of the Circuit Court’s Findings of Fact, Conclusions of Law, and Order were given. (SR. 2984-2991). Kelly’s Notice of Appeal was filed on August 13, 2024. (SR. 2991-92). Finally, on August 17, 2018, the Circuit Court entered its 2024 Order, (SR. 3014), and Notice of Entry was provided on August 22, 2024. (SR. 3018). While Kelly’s original Docketing Statement referenced the 2024 Order, the 2024 Order had not yet been issued before this Docketing Statement was filed, and so Kelly submitted an Amended Docketing Statement of an abundance of caution on August 22, 2024, which specifically identified and included a copy of the 2024 Order.

ARGUMENT

I. Standard of Review

This Court has applied its standards of review from divorce proceedings to its review of partnership dissolution matters. *See In re Dissolution of Midnight Star Enterprises, L.P. ex rel. Midnight Star Enterprises, Ltd.*, 2006 S.D. 98, ¶ 7, 724 N.W.2d 334, 336. In *in re Midnight Star*, for example, this Court cited a divorce case for the

proposition that its “review of a circuit court's valuation of property is [under the] clearly erroneous [standard].” *Id.* (*Priebe v. Priebe*, 1996 SD 136, ¶ 8, 556 N.W.2d 78, 80). In the *Priebe* matter just referenced, this Court also stated in the divorce context that it would “apply an abuse of discretion standard when the trial court’s property division is reviewed.” *Priebe*, 1996 S.D. 136, at ¶ 9. Thus, under *In re Midnight Star*, this same standard applies to this Court’s review of the Circuit Court’s division of Partnership property, which is an equitable matter and requires an equitable distribution of the Partnership’s assets. *See Mundhenke v. Holm*, 2010 S.D. 67, ¶ 15, 787 N.W.2d 302, 306.

More generally, the Court reviews the Circuit Court’s legal determinations de novo, affording no deference to the Circuit Court’s conclusions of law. *Priebe*, 1996 S.D. 136, at ¶ 8. Finally, one of the issues on appeal concerns whether certain decisions made by Tim and Steve fall within the “ordinary course of business” provision of SDCL § 48-7A-401(j), which this Court has held can present a mixed question of law and fact. *Casey Ranch Ltd. P’ship (CRLP) v. Casey*, 2009 S.D. 88, ¶ 7, n.2, 773 N.W.2d 816, 820. As appropriate, Kelly will note the applicable standard of review in the sections below.

II. The Circuit Court Abused its Discretion When it Distributed Partnership Real Estate Prior to the Parties’ Private Auction

On November 30, 2017, Kelly filed a Motion for Appointment of Receiver and Liquidation of Partnership Property due to concerns regarding Tim’s and Steve’s management and use of Partnership property during its windup. (SR. 82-83). Among other things, Kelly proposed having the Partnership’s real estate be distributed via a private auction among the parties. *See In re Midnight Star*, 2006 S.D. 98, at ¶¶ 27-28 (noting favorable case law allowing withdrawing partners to be bought out rather than forcing a sale of all partnership assets). This would have the salutary effect of giving each

partner a fair opportunity to bid on the Partnership real estate of their preference, while avoiding the economic waste of a public sale.

The Circuit Court granted Kelly's request in part, but excluded certain Partnership real estate from the auction process and, instead, distributed those lots to the parties in advance. *See* 2018 Order, § 4.a. Specifically, the Circuit Court distributed to each party the piece of Partnership real estate upon which that partner was then residing (for brevity, the party's "homesite"). *Id.* Tim and Steve were each living on improved feedlots with a quarter of land apiece, whereas Kelly's homesite was a residential home in Lane, South Dakota. *See* February Tr. 11:22-12:3. The Circuit Court directed the parties to have the homesites appraised for purposes of allocating their values to each partner's 1/3 share of Partnership assets. 2018 Order, § 4.d.

The Court should conclude the Circuit Court abused its discretion by dividing these Partnership assets in this fashion. *Priebe*, 1996 S.D. 136, at ¶ 9. Specifically, the Circuit Court effectively treated the homesite of each partner as though that partner possessed an individual interest in the Partnership's real estate that the other partners did not. However, South Dakota law is clear that "[p]roperty acquired by a partnership is property of the partnership and not of the partners individually." SDCL § 48-7A-203. Similarly, South Dakota law provides that "[a] partner is not a co-owner of partnership property[.]" SDCL § 48-7A-501. Therefore, just as each partner had an equal interest in these Partnership assets, so, too, should each partner have received an equal opportunity to bid on those Partnership assets at the private auction.

As Kelly explained at trial, he was the partner most heavily involved with the Partnership's livestock operation. Tr. 69:18-19; *see also* Tr. 73:3-4 (explaining he and

John “did probably 90 percent of the livestock”). However, Kelly’s homesite was the only piece of property divided up in advance by the Circuit Court that was not accompanied by its own quarter with an improved feedlot. Tr. 77:4-7. In contrast, the parcels given to Tim and Steve were improved with corrals, fences, and other facilities for livestock, which would have been more useful and valuable to Kelly. Tr. 83:9-14. As such, Kelly testified that this division put him at a significant disadvantage, and he would have been willing to purchase either Tim’s or Steve’s homesite at the highest value at private auction. Tr. 83:4-9. As discussed in more detail, below, Tim and Steve subsequently removed many of the improvements on these lots, which is both wasteful and would not have occurred had Kelly had an opportunity to purchase the land. Nonetheless, this Court should conclude the Circuit Court abused its discretion by precluding each partner from having an equal opportunity to purchase these Partnership assets at private auction. Thus, the Circuit Court should be reversed.

III. The Circuit Court Erred in its Valuation and Distribution of Other Partnership Assets Following Trial

A. The Circuit Court Erred in its Valuation of the Parties’ Homesites

Assuming the Court does not agree that the Circuit Court erred when it distributed the aforementioned homesites prior to the parties’ private auction, then the Court must also review how those properties were valued. *See Priebe*, 1996 S.D. 136, at ¶ 8 (applying the clearly erroneous standard to the valuation of property). As noted above, the 2018 Order directed the parties to have the homesites appraised. 2018 Order, § 4.a. The parties could then present evidence and arguments to the Circuit Court if any party disputed a homesite’s appraised value. *Id.* In contrast, the other Partnership assets that had not been distributed in advance were subject to a private auction. *Id.*, § 4.b.

The homesites were appraised by Meekins Appraisals in April 2018. *See* Tr. Ex. D (appraisal for Steve's homesite); Tr. Ex. E (appraisal for Tim's homesite); Tr. Ex. E (appraisal for Kelly's homesites). Steve's and Tim's quarter sections were appraised at \$690,000.00 and \$660,000.00, respectively, or approximately \$4,312.50 per acre, and \$4,125.00 per acre, respectively. Tr. 77:18-23. Kelly's property which, again, was not on a quarter of land, was appraised at \$44,000.00. Tr. 77:23.

The results of the private auction are recorded in Exhibit 5. In addition, for reference, Trial Exhibit 21 (the copy may be stamped as Exhibit 22) contains a township map with handwritten notations that illustrates where these properties are in relation to one another, and which partner received which property following the private auction. *See* Tr. 78:10-16; Tr. Ex. 21 (*i.e.*, "K" = "Kelly," "S" = "Steve," and "T" = "Tim").

Comparing the results of the private auction with the Meekins appraisal highlights the inequities of the two different approaches. For example, the "Schaller" property is a five-acre feedlot of nearly identical quality to Tim's homesite located within the same section as Tim's quarter, and Tim paid \$10,800.00 per acre for the Schaler lot. Tr. 79:6-20. The "Holtus" and "Aunt Iola" properties are adjacent to Tim's quarter, and those lots were purchased by Steve for \$9,000.00 per acre, and \$12,000.00 per acre, respectively. Tr. 80:3-11. Directly South of the Aunt Iola parcel is the "North Nielson" lot, which Steve purchased for \$8,200.00 per acre, and directly South of that is the "South Nielson" lot, which Kelly purchased at \$8,000.00 per acre. Tr. 81:2-5. The "Slack" property is located about a mile to the East of Tim's quarter, and Kelly paid \$12,000.00 per acre for that property. Tr. 81:10-16. Similarly, Kelly purchased the "Solberg" property directly to the North of Steve's quarter at \$9,000.00 per acre. Tr. 81:23-82:4. Thus, the Meekins

appraisal undervalued Tim and Steve's homesites by 200%-300% when compared to the land literally touching those homesites, which the Circuit Court recognized. Finding of Fact, ¶ 12.

The Circuit Court likewise recognized that using these two valuation approaches would result in an inequitable distribution of Partnership assets. Finding of Fact, ¶ 14. The Circuit Court then attempted to remedy that outcome by taking an average of all the other real estate prices from the parties' private auction and then averaging that figure against the Meekins appraisals for Tim's and Steve's homesites. Finding of Fact, ¶ 15. This resulted in Tim's homesite being valued at \$1,007,981.00, and Steve's homesite being valued at \$1,027,280.00. Finding of Fact, ¶¶ 16-17.

While ameliorative, the Circuit Court's approach was still erroneous and resulted in the partners not sharing equally in the Partnership's assets. *Contra* SDCL § 48-7A-401(b). Instead, the Circuit Court should have disregarded the Meekins appraisals altogether and determined the value of Tim's and Steve's homesites solely based on the average per-acre price of the other Partnership real estate from the private auction. This real estate was all in the same vicinity as Tim's and Steve's homesites, and the Circuit Court recognized that using the Meekins figures would not be reasonable or equitable. Yet, by nonetheless including the Meekins appraisals, the Circuit Court artificially and inequitably depressed the values of Tim's and Steve's homesites to Kelly's detriment.

For example, the Circuit Court calculated the average per-acre price from the private auction at \$8,529.00. Tr. 399:9-18. Had the Circuit Court used that figure, then Tim's and Steve's homesites would have each been valued at approximately \$1,364,640.00. However, including the Meekins appraisal in the averaging resulted in the

value of those quarters being reduced by over \$335,000.00 apiece, or over \$670,000.00 in total. Circuit Court thus committed clear error by relying on a valuation that the Circuit Court itself recognized was unreliable. Thus, upon review of the evidence, this Court should be left with a “definite and firm conviction that a mistake has been committed,” and the Circuit Court should be reversed. *Eagle Ridge Ests. Homeowners Ass'n, Inc. v. Anderson*, 2013 S.D. 21, ¶ 12, 827 N.W.2d 859, 864.

B. The Circuit Court Erred in its Valuation of Partnership Hay Inventory

The Circuit Court’s valuation of Partnership hay inventory was also clearly erroneous. *Priebe*, 1996 S.D. 136, at ¶ 8. Mr. Hansen testified that there was no physical inventory of Partnership assets at the time of dissolution, Tr. 26:24-27:3, and the parties presented conflicting evidence on the amount of hay present at that time. For example, Kelly presented testimony and a series of photographs he took in the Spring of 2017, which was shortly after Tim and Steve gave notice of their withdrawal from the Partnership, and which depicted a large number of hay bales in storage. *See* Tr. 113:14-114:17; Tr. Ex. 18 (*see, e.g.*, the photo marked “Kelly 0012” discussed at this point in the transcript). Importantly, Kelly explained that these photographs were taken before the Wieman appraisal in October 2018, and the hay bales depicted in the photos had been removed by that time. Tr. 114:24 –115:4. As a result, Kelly estimated that there was approximately 2,150 tons of hay excluded from the Wieman auction, because it was gone, which Kelly estimated based on his familiarity with commodity pricing to be worth an additional \$656,000.00 in 2017 prices. Tr. 127:2-128:13. When added to the Wieman totals, this yielded a total value of \$889,563.00 in Partnership hay at issue. Tr. 128:14-17. Tim and Steve disputed this, but that is not germane for present purposes.

Rather, when the Circuit Court placed a value on the Partnership hay, it faulted Kelly (and Wieman) for not including the missing hay bales in the Wieman auction count. Tr. 401:16-402:4. Specifically, the Court stated Wieman “had the opportunity at [the time of the auction inventory] to have it appraised and valued.” Tr. 402:1-2. Respectfully, the Circuit Court’s statement is an impossibility—there was simply no way for Wieman to count and appraise hay bales that no longer existed. The Circuit Court thus committed clear error by excluding the missing hay bales on this basis. *Eagle Ridge*, 2013 S.D. 21, at ¶ 12. Stated another way, there is no conflict in the evidence that can be resolved in favor of the Circuit Court’s finding that the missing hay could have been appraised. *Priebe*, 1996 S.D. 136, at ¶ 8. Therefore, the Circuit Court’s valuation of the Partnership hay inventory is clearly erroneous, and the Circuit Court should be reversed.

C. The Circuit Court Erred as a Matter of Law Regarding Post-Auction Damage to the Solberg Property

As part of the parties’ private auction, Kelly bid on and received the “Solberg” property, whereas Steve bid on and received the “Holtus” property, both at the same price. Tr. 81:23-82:2; Tr. 83:21-23; *see also* Tr. Ex. 5. As noted, *supra*, Trial Exhibit 21 contains a township map for reference with handwritten notations to illustrate where these properties are in relation to one another. *See* Trial Ex. 21.

In the early 1990s, the Partnership added a drainage ditch in order to drain water off of the Solberg property and toward the South, where the ditch eventually met up with a natural waterway. Tr. 84:4-5; 84:17-23. Without the ditch, water would pond on the Solberg parcel, which interfered with farming the land. Tr. 89:16-90:1. Kelly testified that he farmed the Solberg land before and after the ditch was added, and he saw first-hand the difference that it made in diverting water from the property. Tr. 89:23-90:1; Tr.

91:24-25. Nonetheless, sometime following the parties' private auction--and thus after Kelly bid on and was awarded the Solberg land--Tim and Steve filled in the drainage ditch, which once again places the Solberg land at risk of flooding. Tr. 84:10-16; 85:10-13. Kelly estimated that removing the drainage ditch reduced the value of the Solberg lot by 30%. Tr. 91:5-16; *see also Coyote Flats, L.L.C. v. Sanborn Cnty. Comm'n*, 1999 S.D. 87, 596 N.W.2d 347, 352 (recognizing a landowner may testify to the value of his or her land).

On this issue, Kelly requested alternative forms of relief from the Circuit Court. One, for the diminishment in Solberg's value to be accounted for in his 1/3 allocation of Partnership assets, which at 30%, would be an offset of \$420,000.00. Tr. 91:8-12. Or two, for the Circuit Court to swap ownership of the Solberg land (which Kelly purchased in the auction) for the Holtus land (which Steve purchased and which had a similar value). Tr. 90:20-25. This way, the parties who damaged the Solberg land after the property had been purchased by Kelly would be the ones who lived with the consequences of their actions. Tr. 91:2-4.

Here, however, the Circuit Court declined to provide any relief, although it did not dispute or discredit Kelly's testimony regarding the removal of the ditch or the effect of its removal on Kelly's property. Rather, the Circuit Court concluded that "any complaints regarding drainage problems allegedly caused by Tim and Steve on the Solberg parcel are not properly part of this partnership dissolution proceeding and need to be pursued in a separate civil action." Finding of Fact, ¶ 8.

Though not clearly stated, the Circuit Court's ostensible conclusion was that there was no legal remedy it could provide, which is a conclusion of law that should be

reviewed de novo. *Burkhart v. Lillehaug*, 2003 S.D. 62, ¶ 9, 664 N.W.2d 41, 42. A partner in a partnership has an obligation to avoid committing waste of partnership assets or property. See *In re Midnight Star*, 2006 S.D. 98, at ¶ 27. In addition, while the private auction had concluded prior to trial, the Circuit Court was advised that deeds had not been exchanged concerning the Partnership real estate, and so the land all remained Partnership property. See Tr. 115:22-116:2; see also SDCL § 48-7A-203 (“Property acquired by a partnership is property of the partnership and not of the partners individually.”). Further, the Circuit Court went on to address similar allegations of waste and damaged Partnership property, and so the Circuit Court was well aware of its authority to act. See Findings of Fact, ¶ 25. Therefore, this Court should conclude the Circuit Court erred when it declined to provide any relief for the removal of the Solberg drainage ditch, whether the remedy is ultimately one for a monetary offset or for swapping ownership of the Solberg land for the Holtus land. Thus, the Circuit Court should be reversed.

D. The Circuit Court Erred in its Valuation of Rent Owed to the Partnership

The Circuit Court’s valuation of rent owed to the Partnership was also clearly erroneous. *Priebe*, 1996 S.D. 136, at ¶ 8. In 2017, and after Tim and Steve gave notice of their withdrawal from the Partnership, the parties worked out an agreement whereby crops that had already been planted could be used by Tim and Steve in exchange for cash rent. Tr. 137:13-18. However, Tim and Steve continued to use Partnership farming equipment beyond this agreed-upon point for their own personal farming operations, which was not part of the parties’ arrangement. Tr. 137:19-24. At the same time, Kelly did not have access to the equipment used by Tim and Steve. Tr. 137:25-138:4.

Later on, in the Spring of 2018, the parties reached a separate agreement whereby the Partnership equipment was divvied up at that time. Tr. 138:5-17. Accordingly, Kelly asserted a claim for a 1/3 share of the rental value Tim and Steve should have paid the Partnership for using its equipment in 2017 for their own purposes. Tr. 138:11-12.

The value of the Partnership's assets used by Tim and Steve in 2017 was approximately \$6,058,731.97, and is reflected in the Partnership's balance sheet for that year. Tr. 137:1-4; Tr. Ex. 17 (tab 26). Kelly testified that Tim and Steve had used all of the Partnership's equipment during this time, aside from a John Deere tractor. Tr. 138:2-4. Kelly estimated Tim and Steve's personal use of the equipment would have depreciated it by approximately 10%, or about \$600,000.00, which should have been paid to the Partnership. Tr. 136:4-11; Tr. 137:5-7. Therefore, Kelly's 1/3 interest in that amount was equal to a claim for \$200,000.00. Tr. 137:8-10.

However, the Circuit Court awarded \$0 for Tim and Steve's personal use of Partnership assets. Finding of Fact, ¶ 24. In its oral ruling, the Circuit Court believed there was insufficient evidence of what all equipment was used, for how long it was used, and for the value of the Partnership's equipment during this time. Tr. 402:23-25. Yet, each of these points was specifically addressed by Kelly, and a party is only required to prove damages with reasonable certainty. *FB & I Bldg. Prod., Inc. v. Superior Truss & Components, a Div. of Banks Lumber, Inc.*, 2007 S.D. 13, ¶ 20, 727 N.W.2d 474, 480. In fact, Tim provided an alternative valuation of \$42,000.00 based off of his estimation using hourly equipment rental rates. Tr. 221:22-25. Therefore, while there was a conflict in the evidence over the appropriate dollar amount at issue, there was no evidence to suggest the dollar amount should be \$0 or that no Partnership equipment was used by

Tim and Steve. Stated another way, there is no conflict in the evidence that can be resolved in favor of the Circuit Court's finding that \$0 was due. *Priebe*, 1996 S.D. 136, at ¶ 8. Thus, the Circuit Court's finding on the appropriate rental value of Partnership equipment is clearly erroneous, and the Circuit Court should be reversed.

E. The Circuit Court Erred When it Held the Removal of Partnership Assets Was Done in the "Ordinary Course of Business"

Two of the Partnership's livestock corrals were removed by Tim and Steve in 2017 after they provided notice of withdrawing from the Partnership. Tr. 96:24-97:13. Kelly estimated the corrals were each worth \$50,000.00, and that there was no legitimate Partnership purpose served by having them removed. Tr. 98:10-24. Further, he explained that when the parties later held a private auction, those properties became less desirable and valuable to Kelly, who was most heavily involved in the livestock aspect of the Partnership. Tr. 99:1-7.

In addition, a number of the Partnership's fences had also been removed by Tim and Steve. Tr. 21-24. Kelly identified the specific properties where fencing had been removed, as well as the particular type of fence (*i.e.*, woven versus barbed wire), and the length of the fences that had been taken out. Tr. 99:25 – 101:23. In total, Tim and Steve removed approximately 2.7 miles of the Partnership's regular barbed wire fence, and another 3 miles of the Partnership's woven wire fence prior to the parties' private auction. Tr. 105:9-12. Kelly estimated the cost to replace the barbed wire fence to be about \$3.50 per mile, whereas the cost to replace the woven wire fence would cost around \$4.00 per mile. Tr. 105:22-106:9. Thus, Kelly testified that it would cost approximately \$114,180.00 to replace the Partnership fences that Tim and Steve removed. Tr. 106:10-20.

As with the corrals that had been removed, the loss of this fencing also made the affected properties less desirable and valuable to Kelly at the parties' private auction given his focus on raising livestock. Tr. 107:17-20. Similarly, Kelly testified there was no legitimate Partnership purpose that had been served by removing the fences. Tr. 107:21-24. Rather, all of the fencing had been usable and functional for the Partnership's livestock operations. Tr. 107:25-108:5.

In addition to corrals and fences, Tim and Steve also sprayed and killed Partnership crops prior the parties' private auction. Specifically, they killed off alfalfa growing at what the parties identified as the "Knigge place," along with fescue grass growing at the Solberg lot, and on the quarter distributed to Steve. Tr. 109:22-110:13. These crops were all in good, productive shape, and had been planted recently. Tr. 110:14-25. The fescue, in particular, was used to feed the cattle for the Partnership's livestock operation, whereas Tim and Steve replaced the alfalfa with corn that was not productive. Tr. 110:23-111:15. Their motive is obvious: Kelly was the one interested in livestock and Tim and Steve made Partnership assets less attractive to Kelly.

Kelly estimated the fescue grass Tim and Steve destroyed had a value of \$110 per ton. Tr. 111:22-112:3. However, the fescue was very young and only been harvested once prior to its removal to avoid over-pressuring it and potentially killing the crop. Tr. 112:6-8. Therefore, Kelly estimated its loss was worth approximately \$120,000.00, and he testified that its removal made the affected property less valuable and desirable to him. Tr. 112:11-17. Similarly, as for the alfalfa, Kelly testified there were 320 acres on the Knigge land, and the Partnership would typically harvest four tons per acre. Tr. 112:24-

113:113:3. Kelly estimated the value of the alfalfa to also be approximately \$120,000.00. Tr. 112:18-23.

To summarize, the value of Partnership assets removed by Tim and Steve was as itemized follows: (1) \$100,000.00 for the corrals; (2) \$114,180.00 for the fencing; (3) \$120,000.00 for fescue grass; and (4) \$120,000.00 for alfalfa. In response, Tim testified that he and Steve removed these Partnership assets as a “management decision” on behalf of the Partnership to shift its operations into a different direction. *See* Tr. 225:1-5; Tr. 232:16-18. In particular, Tim testified that he and Steve intended to discontinue the Partnership’s livestock operation. Tr. 307:2-11. The Circuit Court credited Tim’s testimony regarding his “management decision” explanation and assigned \$0 for the Partnership’s loss of these assets. Finding of Fact, ¶ 25.

South Dakota law governs the manner in which partnership decisions can be made and by whom:

A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all of the partners.

SDCL § 48-7A-401(j). This Court stated in *Casey Ranch* that determinations of whether an activity falls within the “ordinary course of business” can present a mixed question of law and fact. *Casey Ranch*, 2009 S.D. 88, at ¶ 7, n.2. Specifically, the Court held that “[t]he standards created to define and interpret the phrase ‘ordinary course of business’ involve questions of law.” *Id.* (quoting *In re National Steel Corp.*, 351 B.R. 906, 913 (N.D. Ill. 2006). “However, what transpired between the parties both in the ordinary

course of their business relationship and in the transactions at issue is a question of fact.” *Id.* (quoting *In re National Steel Corp.*, 351 B.R. at 913).

Here, the Circuit Court did not discredit or disagree with the thrust of Kelly’s overall testimony that Tim and Steve had removed fences, corrals, and crops shortly after giving notice of their withdrawal from the Partnership. While the Circuit Court expressed uncertainty with determining exactly what had been removed, the Circuit Court ultimately determined (without explicitly stating it) that Tim’s and Steve’s decision to do so fell within the ordinary course of the Partnership’s business, and so only an agreement of a majority of the partners was required. Finding of Fact, ¶ 25; *see also* Tr. 403:7-16 (describing these activities as “partnership decision[s]”). Thus, the dispute here is not a factual one, but a question about whether the Circuit Court’s legal conclusion was correct, which this Court reviews *de novo*. *See Burkhart*, 2003 S.D. 62, at ¶ 9.

In *Casey Ranch*, this Court looked to bankruptcy jurisprudence and cases interpreting the phrase “ordinary course of business” as it is used in 11 U.S.C. § 547(c)(2). *Casey Ranch*, 2009 S.D. 88, ¶ 7, n.2. In those cases, “a transaction occurs in the ordinary course when there is a showing that the transaction is the sort occurring in the day-to-day operation” of the entity. *JTM Enterprises v. Oddello Indus., LLC*, 2023 WL 8281841, at *8 (Tenn. Ct. App. Nov. 30, 2023). Courts often compare whether an entity’s past business practices underwent “any significant alterations” when compared to the present. *Matter of Garofalo's Finer Foods, Inc.*, 186 B.R. 414, 425 (N.D. Ill. 1995) (quotation omitted). Stated another way, courts typically assess whether the transaction or decision at issue “in any way deviated from the regular course of business” of the company. *MidWestOne Bank & Tr. v. Com. Fed. Bank*, 331 B.R. 802, 827 (S.D. Iowa

2005) (observing that feeding corn and silage to cattle was part of the entity's regular course of business, and that its owners "were acting as they always had in the ordinary course of their business relationship with BLMI, and such action cannot be deemed unusual.").

Here, Tim's and Steve's decision to transition the Partnership away from its historical livestock operation and to tear out a number of corrals, fences, and productive crops that were used for that purpose is not consistent with the Partnership's prior and regular business practices. Rather, their actions constituted a significant alteration of the Partnership's operation occurring after they withdrew from the Partnership. As such, these activities were "outside the ordinary course of business of [the] [P]artnership" and could "be undertaken only with the consent of all of the partners," which here does not exist. SDCL § 48-7A-401(j). Thus, the Circuit Court erred as a matter of law when it held otherwise, and the Circuit Court must be reversed.

F. The Circuit Court Abused its Discretion When it Refused to Apportion the Cost of a Forensic Audit Among the Partners

The Court reviews the Circuit Court's division of Partnership property under the abuse of discretion standard. *Priebe*, 1996 S.D. 136, at ¶ 9. Kelly's Motion for Appointment of Receiver and Liquidation of Partnership Property filed on November 30, 2017, also requested authorization to conduct a forensic audit of the Partnership. (SR. 82). The Circuit Court, in its 2018 Order, granted that request, but on the condition that Kelly engage the forensic accountant at his own expense. 2018 Order, § 3. The Circuit Court reserved ruling on whether it would allocate the cost of the forensic audit among the other parties "based on the findings of the audit." *Id.*

Kelly retained Eric Hansen, a forensic accountant of the Eide Bailly, LLP firm, to conduct the forensic audit, and Mr. Hansen compiled over 1,735 pages of documents concerning Partnership assets, finances, expenses, and other records, Tr. Ex 17, along with a report he authored in late 2018, Tr. Ex. 18, and a supplemental report from April 2019. Tr. Ex. 19. As Mr. Hansen explained, there was no physical inventory of the Partnership at the time of its dissolution, and so he needed to use the best information available to “recreate what was produced, what was sold, and what the ending inventory should have been[.]” Tr. 27:11-16. As the Circuit Court noted, the Partnership witnesses who testified at trial had conflicting memories, and there were poor records, and so the Circuit Court “tried to rely on third parties when [it] could.” Tr. 401:13-15. In doing so, the Circuit Court found Mr. Hansen “to be the most credible on the subject of [crop] inventory,” and adopted his “half-full” approach to accounting for the Partnership’s inventory, which was a major point of contention. Finding of Fact, ¶¶ 19-20. However, the Circuit Court did not allocate any portion of the expense of obtaining the audit to any of the other partners, which was approximately \$22,650.00. *See* Tr. Ex. 1 (line 38).

The Circuit Court abused its discretion in refusing to apportion the costs associated with the forensic audit among the partners. Under South Dakota law, partners all share equally in partnership profits and expenses. SDCL § 48-7A-401(b). Similarly, a partner is entitled to repayment “for reasonable compensation for services rendered in winding up the business of the partnership.” SDCL § 48-7A-401(h). Further, Tim and Steve also had requested an accounting of the Partnership in their Answer. (SR. 16-20). Thus, not only did the Circuit Court credit and rely on Mr. Hansen’s work, but given the state of the Partnership’s records, this was simply an expense incurred for the

Partnership's benefit. Therefore, the Court should conclude the Circuit Court abused its discretion when it refused to apportion the cost of obtaining Mr. Hansen's forensic audit among the partners.

G. The Circuit Court Erred in its Valuation of Expenses Allocated to Kelly

The Circuit Court's valuation of expenses allocated to Kelly is reviewed under the clearly erroneous standard. *Priebe*, 1996 S.D. 136, at ¶ 9. At trial, Tim and Steve argued that a number of expenses they allegedly incurred for the benefit of the Partnership should be paid by Kelly. In support, they offered Exhibit SS, which ostensibly sets out these expenses. *See* Tr. Ex. SS. Kelly agreed to pay the first two entries related to fertilizer applications. Tr. 149:13-22. Together, these entries add up to \$7,346.00, and are itemized in the Trial Score Sheet under Line 39. *See* Finding of Fact, ¶ 28; Exhibit 1 (Line 39). Kelly disputed responsibility for paying most of the other entries.

For Line 40, which pertains these various expenses, the Circuit Court allocated \$29,566.00 as Kelly's responsibility. Finding of Fact, ¶ 29. The Circuit Court explained it was excluding entries 10, 14, 15, and 16 from Exhibit SS from this allocation for lack of proof. Tr. 403:24-404:2. Excluding these entries, along with entries 1 and 2 (because those are already accounted for on Trial Score Sheet under Line 39), results in an aggregate of \$12,448.70 in expenses at issue on Exhibit SS. It is unknown where the other \$17,117.30 allocated to Kelly is accounted for, and the Circuit Court did not explain its calculation or the evidence it was relying upon. As such, there is no conflict in the evidence that can be resolved in favor of the Circuit Court's findings. *Priebe*, 1996 S.D. 136, at ¶ 8. Thus, this Court should conclude the Circuit Court's finding as to these expenses is clearly erroneous, and the Circuit Court should be reversed.

IV. The Circuit Court Erred When it Denied Kelly's Post-Trial Motion to Enforce the Judgment and the Parties' Negotiated "Cash Default" Provision

The parties stipulated to the terms of the private auction following the 2018 Order, which included a "cash default" provision that addressed the consequences of a partner's failure to make the equalization payment as ordered by the Circuit Court. (*See* SR. 2864, Ex. B). That is, the parties agreed the creditor partner could select a non-homestead parcel of real estate that had been distributed to the debtor partner, and to purchase that parcel at its tax assessed value, which would then go toward satisfying the debtor partner's obligation to the creditor partner. *Id.* As proposed by counsel for Tim and Steve, this provision "should incentivize bidding within one's budget and mobilizing capital between the auction and true-up." *Id.*

The Circuit Court's Judgment was entered on March 26, 2024. The Judgment required Tim and Steve to make an equalization payment to Kelly in the amount of \$143,326.00. *Id.* "A judgment or an order becomes complete and effective when reduced to writing, signed by the court or judge, attested by the clerk and filed in the clerk's office." SDCL § 15-6-58. A party can seek enforcement of a judgment 30 days after its entry. SDCL §15-6-62(a).

Here, on June 26, 2024—approximately 92 days following entry of the Judgment—Kelly filed a motion to enforce the "cash default" provision, as Tim and Steve had failed to make the required equalization payment. (SR. 2855). In response, Tim and Steve tendered the belated equalization payment to Kelly, essentially conceding there was no excuse for their failure to make the payment earlier. (*See* SR. 2924, Ex. B) (enclosing a copy of the check). Nonetheless, the Circuit Court ultimately denied Kelly's motion to enforce the "cash default" provision. *See* 2024 Order. (Appellant Appx. 16).

The Circuit Court's ruling is subject to de novo review. *Wichman v. Shabino*, 2014 S.D. 45, ¶ 5, 851 N.W.2d 202, 203 (applying de novo review to Circuit Court's determination of a party's effort to enforce a judgment); *see also Cont'l Grain Co. v. Brandenburg*, 1998 S.D. 118, ¶ 13, 587 N.W.2d 196, 199 (applying de novo review to findings made upon documentary evidence). Here, the Circuit Court did not clearly articulate its findings. In denying Kelly's motion, the Circuit Court appears to have found that Kelly was required to give notice to Tim and Steve of their obligation to make the equalization payment prior to seeking redress. July Tr. 11:12-22.

However, neither the "cash default" provision, nor the Circuit Court's Judgment, contains such a requirement. Rather, the undisputed evidence shows Tim and Steve had failed to make the equalization payment to Kelly, and that more than 30 days had passed following entry of the Judgment. Nothing more was required for Kelly to invoke the "cash default" provision which, again, was negotiated by the parties in accordance with the 2018 Order. Consequently, the Circuit Court erred by interjecting additional terms to which the parties never agreed and which the Judgment does not contain. Thus, the Circuit Court's 2024 Order must be reversed, and this Court should conclude that Kelly is entitled to receive the Holtus property with the equalization payment recalculated to account for its tax assessed value.

CONCLUSION

The Circuit Court should be reversed on several grounds. Specifically, the Court should conclude the Circuit Court abused its discretion in the 2018 Order when it distributed Partnership property without providing the parties with an opportunity to purchase or otherwise obtain those properties. The Court should also conclude the Circuit

Court erred in its determination and assignment of values of certain Partnership assets, and that the Circuit Court abused its discretion when it refused to allocate the costs of the forensic audit among the parties. The Court should also conclude the Circuit Court erred when it held that Kelly had no recourse of damages done to property he purchased following the parties' private auction, and when it held certain actions taken by Tim and Steve fell within the "ordinary course of business" provision of SDCL § 48-7A-401(j). Finally, the Court should conclude the Circuit Court erred in its 2024 Order when it denied Kelly's post-Judgment motion to enforce the "cash default" provision.

Dated at Sioux Falls, South Dakota, this 4th day of November, 2024.

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully request oral argument.

Dated at Sioux Falls, South Dakota, this 4th day of November, 2024.

DAVENPORT, EVANS, HURWITZ &
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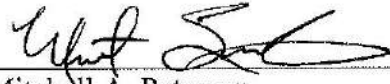
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellant complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 365, this Brief contains 8,560 words and 44,026 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 points) and was prepared using Microsoft Word 365.

Dated at Sioux Falls, South Dakota, this 4th day of November, 2024.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellant" was filed electronically with the South Dakota Supreme Court and that the original was filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on the 4th day of November, 2024.

The undersigned further certifies that an electronic copy of "Brief of Appellant" was served electronically to the attorneys set forth below, on the 4th day of November, 2024:

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Dated at Sioux Falls, South Dakota, this 4th day of November, 2024.

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APPENDIX

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A

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF JERAULD)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

KELLY JACKSON,

Plaintiff,

vs.

TIM JACKSON and STEVE JACKSON,

Defendants.

36CIV17-000015

ORDER

Plaintiff's motion for appointment of a receiver, a forensic audit, and auction of partnership real estate and equipment was heard by the Court on February 27, 2018, with counsel and the parties present. Defendants' motion to rent the partnership real estate for the 2018 crop year and motion to purchase Plaintiff's interest in the partnership was also heard by the Court at the same time. Based on the written and oral submissions, the Court enters the following order, the reasons for which decisions were stated at the February 27, 2018, hearing:

1. Defendants' motions are denied.
2. Plaintiff's motion for appointment of a receiver is denied.
3. Plaintiff's motion for a forensic audit is granted as follows: Plaintiff may, at his expense, conduct a forensic audit of the partnership that is the subject of this civil action and Defendants are ordered to cooperate with the forensic audit process; the Court reserves the right to allocate the cost of the forensic audit among the parties based on the findings of the audit.
4. Plaintiff's motion regarding auctioning the partnership real estate and equipment is granted as follows:

- a. The partnership shall distribute to:
- i. Tim Jackson the partnership-owned home in which he is living and the quarter section of land on which it sits (SE $\frac{1}{4}$ of Section 20 in Franklin Township, Jerauld County) at fair market value to be determined by the Court;
 - ii. Steve Jackson the partnership-owned home in which he is living and the quarter section of land on which it sits (SW $\frac{1}{4}$ of Section 8 in Blaine Township, Jerauld County) at fair market value to be determined by the Court; and
 - iii. Kelly Jackson the partnership-owned home in which he is living and the “Lane” lots that are located within the quarter section of land on which it sits at fair market value to be determined by the Court.

The parties shall agree upon an appraiser to determine the fair market value of the above properties. If the parties cannot agree upon an appraiser, the parties shall submit proposals to the Court with a brief written argument and the Court will resolve the dispute without an additional hearing. Each party shall pay one-third of the cost of this appraisal. The parties reserves their rights to have their own appraisals by different appraisers performed and to present evidence and argument as to fair market value. If the parties cannot agree on the fair market value of the properties, the Court will hear evidence and argument on the subject and make a decision.

b. The remaining partnership-owned real estate listed hereafter will be subject to a private auction as described in Exhibit A to this Order. The remaining partnership-owned real estate is as follows: in Franklin Township, Jerauld County, parcels: SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 20, SW $\frac{1}{4}$ of Section 21, NW $\frac{1}{4}$ of Section 27, NE $\frac{1}{4}$ of Section 29, SE $\frac{1}{4}$ of Section 29, NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 29, E $\frac{1}{2}$ of NW $\frac{1}{4}$ of Section 32, and W $\frac{1}{2}$ of NE $\frac{1}{4}$ of Section 32; in Blaine Township, Jerauld County, the NW $\frac{1}{4}$ of Section 8; in Viola Township, Jerauld County, the SE $\frac{1}{4}$ of Section 25; in Crow Lake Township, Jerauld County, the SE $\frac{1}{4}$ of Section 25; and in

Pleasant Valley Township, Aurora County, parcels: NE ¼ of Section 6, SW ¼ of Section 6, NW ¼ of Section 10; and SE ¼ of Section 10.

c. The equipment listed on the “Thuringer” appraisal/list will be subject to a private auction as described in Exhibit A to this Order. Immediately after the auction, the equipment must be made available to the winning bidder in a condition that is materially similar to the condition at the time of the Thuringer appraisal. The parties reserve the right to seek relief and remedies if equipment is not in such condition, disputes to be resolved by the Court.

d. The successful auction values or fair market values (for the real property in ¶ 4.a) for the above real and personal property received by each partner shall be tracked in each partner’s column of partnership assets received and, along with all other partnership assets received through other arrangements (agreements, settlements, further order of the court, or otherwise), shall be trued-up or equalized so that each partner receives one-third of the partnership assets.

5. There are other undisputed and disputed partnership assets that need to be addressed later by the Court. This Order is not intended as a final disposition or wind-up of the partnership. Rather, the above property will be distributed to each partner as indicated and the property and assets received by each partner, along with all other assets and equities related to the partnership, will be subject to equalization and further disposition by the Court to insure that a fair, equitable, and lawful dissolution and wind-up of the partnership is achieved.

6. The parties shall not commit waste or destroy partnership property.

Dated this 17th day of March, 2018.

Signed: 3/17/2018 5:18:54 PM

Attest:

Neely, Lynnette
Clerk/Deputy



Honorable Patrick T. Pardy
Circuit Court Judge



EXHIBIT A – Private Auction Procedure

1. If any auction procedure below is not resolved by mutual agreement of the parties, the parties shall submit proposals to the Court with a brief written argument and the Court will resolve the dispute without an additional hearing.
2. The bidders in the auction shall be Plaintiff and Defendants.
3. A mutually agreeable third party shall serve as the auctioneer.
4. The parties shall select a mutually agreeable date or dates on which to conduct the auction. The auction shall be completed on or before March 12, 2018, unless the Court permits an extension or parties mutually agree to move the deadline.
5. The auction shall take place at the Jerauld County courthouse in Wessington Springs or at a mutually agreeable alternative location.
6. Plaintiff and Defendants shall be in separate rooms and the auctioneer shall move between the rooms to receive and communicate bids on the property being auctioned. The auctioneer shall announce when there is a winning bid and then proceed to the next item to be auctioned.
7. Real estate must be auctioned before equipment is auctioned. Otherwise, the parties are to agree on the order of items to be auctioned.
8. Immediately after the auction is concluded, the winning bidder shall be entitled to immediate use and possession of property.
9. The winning bidder is not required to pay actual money for the property at the auction. Rather, the process described in ¶ 4.d of the Order shall be used.

B

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF JERAULD)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

KELLY JACKSON,

 Plaintiff,

vs.

TIM JACKSON and TIM JACKSON as
Personal Representative of THE ESTATE OF
STEVE JACKSON,

 Defendants.

36CIV17-000015

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT**

As the prevailing party, Plaintiff Kelly Jackson (“Kelly”) submits the following Proposed Findings of Fact, Conclusions of Law, and Judgment to reflect the decision of the Court announced on January 23, 2024, following the trial held January 22 through 23, 2024. By submitting this Proposed Findings of Fact, Conclusions of Law, and Judgment, Kelly does not waive his rights to object to or appeal any finding, conclusion, decision, or judgment of the Court. Rather, Kelly is effectively acting as a scrivener to document the Court’s decision and the below is submitted by Kelly as directed by the Court solely for that purpose.

INCORPORATION OF ORAL DECISION

Following the court trial held on January 22 and 23, 2024, the Court entered into the record Court Exhibit 1 reflecting the Court’s findings, conclusions, and decision, which is attached hereto as Exhibit 1 (hereinafter referred to as “Exhibit 1”). The Court announced its decision following the trial on January 23, 2024, a transcript of which decision is attached hereto as Exhibit 2. Exhibits 1 and 2 are incorporated as if fully set forth under SDCL 15-6-52(a).

FINDINGS OF FACT

1. Any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated as a Finding of Fact.

2. The orally issued decision of the Court announced by the Court on January 23, 2024, a transcript of which is attached as Exhibit 2, is incorporated as if fully set forth under SDCL 15-6-52(a).

3. Exhibit 1 is incorporated as if fully set forth.

4. The parties agreed to use Plaintiff's Trial Exhibit 1, referred to as the trial score card, to track equitable distribution of partnership assets to each partner, Kelly, Defendant Tim Jackson ("Tim"), and Defendant Tim Jackson as Personal Representative for the Estate of Steve Jackson ("Steve").

5. The parties stipulated or otherwise agreed to the values and recipient of the partnership assets reflected in the following rows of Exhibit 1: 3-13, 19-22, 24-29, and 36-27.

6. The parties agreed to the amounts of trust account cash as reflected in rows 34-35 of Exhibit 1, and agreed that the trust account cash would be assigned to the partner(s) who received less than an equitable one-third share of partnership assets following the Court's decision.

7. The parties disputed either the amount or recipient of rows 1-2, 14-18, 23, 30-33, and 38-40 of Exhibit 1, which values and recipients were decided by the Court following trial.

8. The court declines to "swap" the Holtus and Solberg parcels reflected in rows 1-2 of Exhibit 1, as any complaints Kelly has regarding drainage problems allegedly caused by Tim and Steve on the Solberg parcel are not properly part of this partnership dissolution proceeding and need to be pursued in a separate civil action. The court finds that Kelly shall receive the

Solberg parcel and Tim/Steve shall receive the Holtus parcel as determined at the parties' private auction.

9. The Court previously decided that each partner would receive the parcel and quarter-section of land on which each partner's home was located and directed an appraisal process as reflected in the Court's prior order.

10. Tim and Steve's homeplaces sit on quarter-sections of farmland, while Kelly's homeplace is in Lane and does not include a quarter-section of farmland.

11. While the Meekins' appraisal determined the values of Tim and Steve's homeplaces to be \$660,000 for Tim's homeplace and \$690,000 for Steve's homeplace, the Court needs to ensure an equitable distribution of partnership assets such that each partner receives an equitable one-third share of partnership assets.

12. Other quarter-sections immediately adjacent to Tim and Steve's homeplaces and other partnership real estate have values assigned by the parties through the private auction that are double or triple the per-acre price of the Meekins-appraised values for Tim and Steve's homeplaces.

13. The Court finds that a fair and equitable distribution of partnership assets requires the appraised values of Tim and Steve's homeplaces to be adjusted in light of the values the parties allocated to the other real estate in the private auction.

14. Allowing Tim and Steve to receive their homeplaces and connected quarter-sections of land at the Meekins appraised value with Kelly receiving no quarter-sections of land at an appraised value results in an inequitable distribution of partnership assets.

15. The Court finds that a fair and equitable distribution of partnership assets requires the value of Tim and Steve's homeplaces to be determined by taking the average per-acre price

for all other partnership real estate determined by the parties at the private auction and selecting the midpoint of that average real estate value with the Meekins appraised value.

16. Using the above approach, the Court finds the value of Steve's homeplace for purposes of an equitable distribution of partnership assets to be \$1,027,280 as reflected in row 14 of Exhibit 1.

17. Using the above approach, the Court finds the value of Tim's homeplace for purposes of an equitable distribution of partnership assets to be \$1,007,981 as reflected in row 15 of Exhibit 1.

18. Tim and Steve received all corn, oats, and hay inventory at the dissolution of the partnership, but the parties dispute the values to be assigned to such inventories in rows 16-18 of Exhibit 1.

19. The Court finds the testimony of Eric Hansen to be the most credible on the subject of corn and oats inventory.

20. The Court adopts the "half-full" inventory approach of Eric Hansen as set forth in his report and described during his trial testimony.

21. Based on the evidence and testimony presented at trial, the Court finds that Tim and Steve received \$446,229 in corn inventory as reflected in row 16 of Exhibit 1.

22. Based on the evidence and testimony presented at trial, the Court finds that Tim and Steve received \$101,949 in oats inventory as reflected in row 17 of Exhibit 1.

23. Based on the evidence and testimony presented at trial, the Court finds that Tim and Steve received \$34,915 in hay inventory as reflected in row 17 of Exhibit 1.

24. The Court finds that Tim and Steve owe \$0 for use of partnership assets during the post-dissolution/windup phase of the partnership as reflected in row 23 of Exhibit 1.

25. The Court finds either lack of damage or majority partnership decision-making as to removal of fences and alleged destruction of alfalfa and fescue grass; accordingly, the Court finds a value of \$0 for rows 30-32 of Exhibit 1.

26. Because alleged drainage damage to Kelly's Solberg property occurred after effective distribution of the parcel to Kelly, the issue is not properly part of this partnership dissolution proceeding and any claim for relief must be brought in a separate civil action; accordingly, \$0 is awarded on row 33 of Exhibit 1.

27. The Court declines to award any reimbursement to Kelly for expenses related to the forensic audit performed by Eric Hansen of Eide Bailly; accordingly, \$0 is entered for row 38 of Exhibit 1.

28. The Court finds that Kelly received \$7,346 in value for prepaid fertilizer expenses paid by the partnership; accordingly, \$7,346 is entered for row 39 of Exhibit 1.

29. The Court finds that Kelly received \$29,566 in value for various expenses paid by the partnership; accordingly, \$29,566 is entered for row 40 of Exhibit 1.

30. After considering all of the above findings, Kelly received less than his one-third equitable share of partnership assets; accordingly, the trust account cash totaling \$15,928 in the Morgan Theeler trust account (row 34 of Exhibit 1) and trust account cash totaling \$16,650 in the Davenport Evans trust account (row 35 of Exhibit 1) are awarded to Kelly.

31. Taking into account the value and recipient of all partnership assets as reflected above and in Exhibit 1, the Court finds that Kelly received \$143,326 less than his equitable one-third share of partnership assets.

32. Accordingly, Tim and Steve Jackson collectively owe Kelly an equalization payment of \$143,326 to ensure that each partner receives an equitable one-third of partnership assets.

33. Exhibit 1 reflects an equitable distribution of partnership assets ensuring each partner receives his one-third share of partnership property.

34. To the extent any Finding of Fact conflicts with Exhibit 1 or the Court's oral ruling reflected in Exhibit 2, Exhibits 1 and 2 shall supersede the conflicting Finding of Fact.

CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a Conclusion of Law is hereby incorporated as a Conclusion of Law.

2. The orally issued decision of the Court announced by the Court on January 23, 2024, a transcript of which is attached as Exhibit 2, is incorporated as if fully set forth under SDCL 15-6-52(a).

3. Exhibit 1 is incorporated as if fully set forth.

4. The parties agreed on the applicable law as set forth in the joint outline of the law submitted prior to trial.

5. The Court applied the agreed-upon law submitted by the parties.

6. The Court finds that the goal of a partnership dissolution is to ensure an equitable distribution of partnership assets to each partner.

7. This Court has equitable powers to ensure each partner receives his fair one-third value of partnership assets.

8. Determining the fair market value of assets for an arms' length sale is not necessarily the correct way to value partnership assets, particularly when the parties participated

in a private auction with potentially above-market values for property while some assets were distributed outside of the private auction process.

9. The values of property as reflected in the above Findings of Fact are what is required for a fair and equitable distribution of partnership assets to each partner.

10. As a result of the foregoing, Tim and Steve are required to pay the total sum of \$143,326 to Kelly to ensure a fair and equitable distribution of partnership assets to each partner.

11. Exhibit 1 reflects an equitable distribution of partnership assets ensuring each partner receives his one-third share of partnership property.

12. To the extent any Conclusion of Law conflicts with Exhibit 1 or the Court's oral ruling reflected in Exhibit 2, Exhibits 1 and 2 shall supersede the conflicting Conclusion of Law.

JUDGMENT

Following the conclusion of the court trial held January 22-23, 2024, and for the reasons set forth in the above Findings of Fact and Conclusions of Law, as reflected in Exhibit 1, and as stated by the Court in open court on January 23, 2024 (see Exhibit 2), the Court hereby enters judgment as follows:

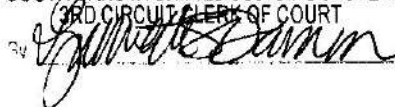
1. All partnership assets shall be distributed as reflected in Exhibit 1;
2. Tim and Steve shall pay Kelly the total sum of \$143,326; and
3. The parties shall sign deeds or other documents necessary to accomplish the judgment of the Court.


Dated this 25 day of February, 2024.

FILED

MAR 28 2024

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM

3RD CIRCUIT CLERK OF COURT



Honorable Patrick Pardy
Circuit Court Judge

C

Item	Nature of Dispute	Court Value	Assigned To
Real Estate			
1	Hofius (SW 1/4 of 21, Franklin) (160 acres)	dispute related to alleged blocking of drainage impacting Solberg	Steve
2	Solberg (NW 1/4 of 8, Blaine) (160 acres)	\$1,440,000	Kelly
3	Robert Peterson (SE 1/4 of 29, NE 1/4 of SW 1/4 of 29, Franklin) (160 acres)	no dispute	Steve
4	Stacy Nickerson (E 1/2 of NW 1/4 and W 1/2 of NE 1/4 of 20, Franklin) (160 acres)	no dispute	Kelly
5	Aunt Lou (NE 1/4 of 29, Franklin) (160 acres)	no dispute	Steve
6	Shack (NE 1/4 of 27, Franklin) (160 acres)	no dispute	Kelly
7	Stechler (NW 1/4 of SW 1/4 of 20, Franklin) (6 acres)	no dispute	Tim
8	Hines (SE 1/4 of 25, Vinton) (160 acres)	no dispute	Steve
9	Partridge (SE 1/4 of 25, Crow Lake) (160 acres)	no dispute	Kelly
10	Landon (SE 1/4 of 10, Pleasant Valley) (160 acres)	no dispute	Steve
11	Mohling (NW 1/4 of 19, Pleasant Valley) (160 acres)	no dispute	Tim
12	Knigge (W 1/2 of 6, Pleasant Valley) (296 or 320 acres)	\$6,350/acre auction price undisputed; dispute as to number of acres	Steve
13	Kelly homestead	no dispute	Kelly
14	Steve homestead	valuation dispute	Steve
15	Tim homestead	valuation dispute	Tim

Item	Nature of Dispute	Court Value	Assigned To
Inventory			
16	corn (amount and value)	\$446,229	Tim/Steve
17	oats (amount and value)	\$101,949	Tim/Steve
18	hay (amount and value)	\$34,915	Tim/Steve
19	wool (amount above \$7,921 deposited in Morgan Theeler trust from sale)	\$0	Tim/Steve
20	P&E-related allegations by Kelly	*	Tim/Steve
Equipment			
21	private auction equipment	\$146,650	Kelly
22	private auction equipment	\$99,439	Tim/Steve
23	rent on equipment usage for 2017 harvest (Tim/Steve usage for non-partnership)	\$0	Tim/Steve
24	Wieman "dealer" fees + "dealer" horse truck at Kelly's place	\$9,000	Kelly
25	Additional equipment on Wieman inventory at Tim/Steve or properties	\$57,695	Tim/Steve
26	Meyers manure spreader	\$30,000	Tim/Steve
27	Kelly's damaged/missing property (dear horse, saddle, bridle, saddle pads, chaps)	\$0	Tim/Steve
28	fuel inventory on Tim/Steve properties	\$12,000	Tim/Steve
29	livestock and related equipment (signed agreement)	\$53,400	Kelly

Item	Nature of Dispute	Court Value	Assigned To	
Waste or Damage to Partnership Property				
30	value of removed fences	disputed	\$0	Tim/Steve
31	value of destroyed alfalfa	disputed	\$0	Tim/Steve
32	value of destroyed fescue grass	disputed	\$0	Tim/Steve
33	Blocking drainage on Solberg after assigned to Kelly in private auction	disputed	\$0	Tim/Steve
Cash from Prior Deals or in Trust Accounts				
34	Morgan Theecler trust deposits	no dispute as to amount; 10 to be assigned as part of equalization	\$15,928	Kelly
35	Davenport Evans trust deposits		\$16,650	Kelly
36	one approved hay harvest sale	no dispute	\$250,000	Tim/Steve
Miscellaneous				
37	Kelly's loss of access to feedlot/livestock areas, grain and hay storage, shop space	disputed	\$0	Tim/Steve
38	forensic audit reimbursement (2/3 of expense Kelly paid, \$22,650)	disputed	\$0	Tim/Steve
39	fertilizer expense	disputed	\$7,346	Kelly
40	personally paid partnership expenses	disputed	\$29,566	Kelly

Totals and Equalization Chart

Kelly Total	\$6,942,540	-\$143,326
Tim/Steve Total	\$14,315,057	\$143,326
Assigned Total	\$21,257,597	
Unassigned Total	\$0	
Grand Total	\$21,257,597	
1/3 Share of Assigned Total	\$7,085,866	

D

STATE OF SOUTH DAKOTA)
)
) SS
COUNTY OF JERAULD)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

<p>KELLY JACKSON, Plaintiff, v. TIM JACKSON and STEVE JACKSON, Defendants.</p>	<p>36CIV17-000015 ORDER AFTER JULY 15, 2024 HEARING</p>
--	---

The above-entitled matter having come before the above Court on the 15th day of July, 2024; the Honorable Patrick T. Pardy, Circuit Court Judge, presiding, upon notice and hearing on Plaintiff's *Motion for Enforcement of the "Cash Default" Provision Under the Stipulated Action Terms* and Defendants' *Motion Regarding Post-Judgment Real Estate*, the Plaintiff represented by Mitchell A. Peterson of Davenport, Evans, Hurwitz & Smith, LLP of Sioux Falls, South Dakota; the Defendants represented by Timothy G. Bottum of MorganTheeler LLP of Mitchell, South Dakota; the Court having reviewed the briefs and affidavits presented by both parties, and having considered all the records on file herein along with argument from the parties and being fully advised regarding all the subject matter herein; the Court having determined from all the records and files herein that it has jurisdiction of the subject matter and the parties hereto; now, therefore, it is by the Court

ORDERED, that *Plaintiff's Motion for Enforcement of the "Cash Default" Provision Under the Stipulated Action Terms* is denied. It is further

ORDERED, the *Defendants' Motion Regarding Post-Judgment Real Estate* is granted and the parties shall both cooperate in drafting, executing and recording the deeds for all real property.

Attest:
Damm, Lynnette
Clerk/Deputy



8/17/2024 3:45:33 PM

BY THE COURT:


Patrick T. Pardy, Circuit Court Judge

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30818

* * * *

KELLY JACKSON, Plaintiff and Appellant,

v.

TIMOTHY JACKSON, Individually
and as Personal Representative of the
ESTATE of STEVE JACKSON, Defendants and Appellees.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE THIRD JUDICIAL CIRCUIT
JERAULD COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE PATRICK T. PARDY
Circuit Judge

* * * *

APPELLEES' BRIEF

* * * *

MITCHELL A. PETERSON of
Davenport, Evans, Hurwitz & Smith, L.L.P.
Sioux Falls, South Dakota Attorneys for Plaintiff
and Appellant.

TIMOTHY G. BOTTUM of
MorganTheeler, LLP
Mitchell, South Dakota Attorneys for Defendants
and Appellees.

* * * *

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PRELIMINARY STATEMENT

Tim Jackson, Steve Jackson, and Kelly Jackson will be referred to by their first names. The Jackson Brothers Partnership will be referred to as the Partnership. Any reference to the Settled Record will be SR followed by the page number corresponding to the Jerauld County Clerk of Courts prepared index.

JURISDICTIONIONAL STATEMENT

Pursuant to SDCL 15-26A-3(1), Plaintiff Appellant Kelly Jackson appeals the circuit court's Findings of Fact, Conclusions of Law, and Judgment filed on March 26, 2024, in the Third Judicial Circuit by the Honorable Patrick T. Pardy following a court trial. Notice of Entry was given on July 15, 2024, and Kelly filed a Notice of Appeal on August 13, 2024. Further, Kelly appeals, pursuant to SDCL 15-26A-7, the circuit court's 2018 Order where it distributed certain real property pre-trial. Appellees do not object to Kelly's statement of jurisdiction.

Defendants/Appellees Tim Jackson and the Estate of Steve Jackson, by Notice of Review, appeal the circuit court's Findings of Fact, Conclusions of Law, and Judgment filed on March 26, 2024, in the Third Judicial Circuit by the Honorable Patrick T. Pardy following a court trial. Pursuant to SDCL 15-26A-22, Appellees filed their Notice of Review and Docketing Statement on August 30, 2024.

STATEMENT OF LEGAL ISSUES

- I. *Whether the circuit court abused its discretion when it distributed certain real property to the Partners before the private auction.*

Prior to the private auction between the partners, the circuit court distributed to each partner the property on which that partner lived, as well as any agricultural property contiguous to the residence.

In re Dissolution of Midnight Star Enters., L.P. ex rel. Midnight Star Enters., Ltd., 2006 S.D. 98, 724 N.W.2d 334
Grode v. Grode, 1996 S.D. 15, 543 N.W.2d 795

SDCL 48-7A-203

II. *Whether the circuit court erred in its valuation and allocation of certain Partnership assets.*

The circuit court allocated and valued certain assets and expenses to each partner during the windup of the Partnership.

In re Dissolution of Midnight Star Enters., L.P. ex rel. Midnight Star Enters., Ltd., 2006 S.D. 98, 724 N.W.2d 334
Van Duysen v. Van Duysen, 2015 S.D. 84, 871 N.W.2d 613
Priebe v. Priebe, 1996 S.D. 136, 556 N.W.2d 78
Springer v. Cahoy, 2013 S.D. 86, 841 N.W.2d 15
Farlee v. Farlee, 2012 S.D. 21, 812 N.W.2d 501

III. *Whether the circuit court erred when it determined that Tim and Steve owed Kelly \$0 for equipment rent.*

The circuit court determined that Tim and Steve did not owe Kelly any rent value for using Partnership equipment during the windup/dissolution time period.

Lamb v. Winkler, 2023 S.D. 10, 987 N.W.2d 398
Paweltzki v. Paweltzki, 2021 S.D. 52, 964 N.W.2d 756
Van Duysen v. Van Duysen, 2015 S.D. 84, 871 N.W.2d 613
Lord v. Hy-Vee Food Stores, 2006 S.D. 70, ¶ 31, 720 N.W.2d 443

22 Am. Jur. 2d *Damages* § 339 (2024)

IV. *Whether the circuit court abused its discretion when it attributed the costs of a forensic audit solely to Kelly.*

Kelly requested permission from the circuit court to hire an accountant to conduct a forensic audit of the Partnership. The circuit court allowed Kelly to seek an audit but allocated the expense of the audit to Kelly.

Feldhaus v. Schreiner, 2002 S.D. 65, 646 N.W.2d 753

V. *Whether the circuit court properly concluded that Kelly's claim for damages to the Solberg property should have been asserted in a separate action*

During trial, Kelly asserted waste claims against Tim and Steve for a drainage issue. The circuit court declined to rule on the issue and instructed Kelly to bring the claim in a separate action.

Rumpza v. Zubke, 2017 S.D. 49, 900 N.W.2d 601

VI. *Whether the circuit court properly concluded that certain actions taken by Tim and Steve were done so within the ordinary course of business.*

The circuit court determined Tim and Steve's decision regarding certain crops and fence structures were made in the ordinary course of business.

Casey Ranch Ltd. P'ship (CRLP) v. Casey, 2009 S.D. 88, 773 N.W.2d 816

SDCL 48-7A-401(j)

VII. *Whether the circuit court properly denied Kelly's motion to enforce the cash default provision of the private auction terms.*

Kelly filed a motion to enforce a cash default provision the parties agreed to prior to the private auction. The circuit court denied the motion.

Holsti v. Kimber, 2014 S.D. 21, 845 N.W.2d 923

McGregor v. Crumley, 2009 S.D. 95, 775 N.W.2d 91

VIII. *Whether the circuit court erred in its recognition and valuation of Partnership grain*

The circuit court determined Tim and Steve retained grain and allocated additional value to Kelly.

Paweltzki v. Paweltzki, 2021 S.D. 52, 964 N.W.2d 756

STATEMENT OF THE CASE

Tim and Steve gave Kelly their notice of withdrawal from the Partnership in April 2017. *SR* at 41. In August 2017, Kelly filed this lawsuit with the circuit court in Jerauld County, Third Judicial Circuit, seeking a court-supervised winding up of the brothers'

partnership. *SR* at 4-10. He also asserted claims of waste, conversion, and interference with a business relationship. *Id.* Tim and Steve answered and filed counterclaims of conversion and breach of fiduciary duty. *SR* at 16-20.

Kelly filed a motion for the appointment of a receiver to assist with the windup, and he also asked the circuit court for permission to hire an accountant to conduct a forensic audit of the Partnership. *SR* at 82. The circuit court's decision regarding these motions was rendered in its 2018 Order filed on March 17, 2018. *SR* at 130-32. In that same order, the circuit court distributed each partner's home, and any land contiguous to the home, to the partner. *Id.* All other land was distributed pursuant to a private auction between the parties. *SR* at 131-32.

Steve died in April 2023, and his Estate was substituted as a party to the case. *SR* at 356. A court trial was held January 22-23, 2024. *SR* at 2848. Following trial, the circuit court completed the windup and ordered Tim and Steve's Estate to pay an equalization payment to Kelly in the amount of \$143,326. *SR* at 2852. The circuit court's Notice of Entry of Findings of Fact, Conclusions of Law, and Judgment was filed on July 15, 2024. *SR* at 2984.

Kelly filed a motion to enforce the cash default provision in June 2024. *SR* at 2856. The circuit court considered the motion at a July 2024 hearing. *SR* at 3014. The motion was denied. *Id.* Kelly filed his Notice of Appeal on August 13, 2024, and Appellees filed their Notice of Review on August 30, 2024. *SR* at 2992.

STATEMENT OF THE FACTS

Steve Jackson and Tim Jackson formed a farming partnership, Jackson Brothers, in 1983. *SR* at 34. In 1994, Steve and Tim's brothers, John Jackson and Kelly Jackson, joined the farming operation, and the brothers began operating as Jackson Brothers

Partnership (“Partnership”). *Id.* The brothers raised sheep and cattle, and also grew and harvested crops.

Throughout the years, the brothers had a bifurcated working relationship: Steve and Tim worked closely together and John and Kelly worked closely together. *SR* at 3148. Tim and Steve mostly handled the crop operation and John and Kelly were most engaged with the livestock. *Id.* John passed away in 2014. *Id.* Following John’s death, the relationship and cooperation Tim and Steve had with Kelly deteriorated. *SR* at 34. Tensions between the brothers continued to rise until a physical altercation in April 2017. *Id.* Following this incident, Steve and Tim gave notice to Kelly that they were withdrawing from the Partnership. *SR* at 35.

Amidst the drought occurring during the spring of 2017, the Partnership was struggling to provide enough feed to its livestock. *SR* at 50. As such, the three brothers decided to sell the livestock. *Id.* Kelly produced a written note memorializing this decision. *SR* at 43. However, Kelly later rescinded and sought to retain the livestock as part of his share of the Partnership assets. *Id.* The brothers signed a Partial Livestock Dissolution Agreement and a Partial Livestock and Machinery Dissolution Agreement that allocated the livestock and livestock equipment owned by the Partnership to Kelly. *SR* at 40-47. However, the Partnership retained some of the cattle and sheep after Kelly inspected the livestock and determined he did not want them. *SR* at 257.

In August 2017, Kelly filed an action with the circuit court seeking a court-supervised winding up of the Partnership. *SR* at 19. Additionally, he asserted claims of waste, conversion, and interference with a business relationship. *SR* at 21-25. Tim and Steve counterclaimed, asserting breach of fiduciary duty and conversion. *SR* at 34.

Furthermore, they filed a motion for temporary relief with the circuit court, seeking an order from the circuit court that permitted Tim and Steve to rent the Partnership's crop ground for the 2017 harvest, blend and sell stored grain, sell the remaining Partnership livestock, and use Partnership equipment for harvest. *SR* at 29. Tim and Steve rented Kelly's one-third share of the land during this time and paid \$81 an acre, which was consistent with the rates of other land the Partnership rented.

Following the parties' pleadings, Kelly filed a motion for the appointment of a receiver to assist in the liquidation of the Partnership assets. *SR* at 97. He also requested permission to hire an accountant to perform a forensic audit of the Partnership. *Id.* Tim and Steve resisted the requests. *SR* at 113. In February 2018, Tim and Steve filed a motion requesting the circuit court to permit them to purchase the Partnership real property, or alternatively, order the real property be publicly auctioned. *SR* at 128. Further, they requested an order that awarded temporary possession of the Partnership real property to Tim and Steve and permit them to lease the real property for the 2018 crop season under the same terms as the 2017 crop season. *Id.*

Following a motions hearing on February 27, 2018, the circuit court denied Tim and Steve's motion concerning real property, denied Kelly's motion to appoint a receiver, and granted Kelly's motion for a forensic audit. *SR* at 130. However, the circuit court allocated the expense of such audit to Kelly but reserved the right to later allocate some expense of the audit to Tim and Steve "based on the findings of the audit." *Id.*

In its 2018 order, the circuit court also made initial distributions of certain real property owned by the Partnership. *SR* at 130-31. Specifically, the circuit court distributed to:

- i. Tim Jackson the partnership-owned home in which he is living and the quarter section of land on which it sits (SE $\frac{1}{4}$ of Section 20 in Franklin Township, Jerauld County) at fair market value to be determined by the Court;
- ii. Steve Jackson the partnership-owned home in which he is living and the quarter section of land on which it sits (SW $\frac{1}{4}$ of Section 8 in Blaine Township, Jerauld County) at fair market value to be determined by the Court; and
- iii. Kelly Jackson the partnership-owned home in which he is living and the "Lane" lots that are located within the quarter section of land on which it sits at fair market value to be determined by the Court.

SR at 131. The parties were ordered to agree on an appraiser to determine the fair market value of the homesites, and if they could not agree, the circuit court would resolve the dispute. *Id.* The brothers agreed to an appraiser and the homesites were subsequently valued. *SR* at 3316. The circuit court directed that the remaining real property, as well as equipment, owned by the Partnership would be distributed pursuant to a private auction between the brothers. *SR* at 131. The circuit court also set forth the procedures for how the private auction would be conducted. *SR* at 133.

The private auction was held in May 2018. Each brother was given the opportunity to bid on certain real property with "monopoly" money. *SR* at 132. Whichever brother provided the highest bid received that property. *Id.* After the entire Partnership was distributed, each brother's assets would be compared and the brother receiving the least amount of assets would be entitled to a "true-up," or equalization, payment. *Id.* During this time, Kelly reasserted his request to appoint a receiver to handle the windup. *SR* at 134. Kelly also sought to have separate litigation between

P&E Enterprises, LLC and the Partnership stayed until the Partnership dissolution issues were resolved.¹ *Id.*

Following the notice of withdrawal from the Partnership, the brothers mutually agreed to sell their corn inventory. *SR* at 289. Tim and Steve retained their shares of the oats inventory, and Kelly's share was thereafter made available for him to receive. *Id.* The entire inventory was made available to Kelly to inspect. *Id.* The inventory also included baled hay and forage, most of which was outdated and its value diminished. *SR* at 290. Kelly did not respond to Tim and Steve and did not remove his share of the oats and forage from the property. *Id.* Accordingly, in April 2020, Tim and Steve filed a motion with the circuit court seeking permission to dispose of certain grain and forage. *SR* at 289-90.

After a series of continuances, a court trial was held January 22-24, 2024.² *SR* at 2848. The parties stipulated to the use of a spreadsheet, referred to during the proceedings as the "Trial Score Card," to track the value of assets each brother received during the windup of the Partnership. *SR* at 3089, 3091. The circuit court heard testimony from Eric Hansen, Kelly, and John Olinger, a neighboring farmer familiar with the Partnership. *SR* at 3095, 3144, 3253.

Appellees presented evidence from Tim, Roger DeRouchey, Eric Jackson, Paul Jackson, and Jonathan Guenther. *SR* at 3268, 3434, 3460, 3473, 3487. Following presentation of the evidence, the circuit court determined valuations on all assets included

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1. Tim's two sons, Paul and Eric (P&E), initiated a lawsuit against the Partnership, claiming that Kelly interfered with P&E's grain operation. *SR* at 152. The circuit court did not take judicial notice of the P&E lawsuit.
 2. Steve died in April 2023, and his estate was thereafter substituted as a party to the case. *SR* at 365, 371.

on the Trial Score Card and made decisions on the legal issues asserted by the parties. The circuit court also allocated one-third value to each brother and, based on the circuit court's valuations and allocations, Tim and Steve were ordered to remit a true-up payment of \$143,326 to Kelly to ensure he received a one-third distribution of the Partnership. *SR* at 2852.

In June 2024, Kelly filed a motion to enforce a cash default provision that was stipulated between the parties prior to the private auction, arguing that the provision applied because he had not yet received his true-up payment. *SR* at 2856. Therefore, Kelly also proposed to swap one of his properties for one of Steve's properties obtained in the private auction. *Id.* At that time, Kelly had not signed and delivered deeds to the remaining partners for the property they acquired through the dissolution. There was abundant correspondence between the parties' attorneys discussing the deeds, potential lis pendens, and other post-trial items. However, Kelly never requested the true-up payment be transferred. At a hearing in July 2024, the circuit court denied Kelly's motion to enforce the cash default provision. *SR* at 3014.

ARGUMENT

I. Whether the circuit court abused its discretion when it distributed certain real property to the Partners before the private auction.

In its March 2018 Order, the circuit court, prior to the private auction and trial, distributed to each brother the property on which his home was located. *SR* at 131. Accordingly, Tim received his home and the Southeast Quarter of Section 20, Steve received his home and the Southwest Quarter of Section 8, and Kelly received his home and the Lane lots located in the quarter section of land that his home sits. *SR* at 131.

Kelly argues that the “Circuit Court abused its discretion by dividing these Partnership assets in this fashion.” Appellant’s Br. 14.

The Court’s “standard of review of a trial court’s property division is that of an ‘abuse of discretion.’” *Grode v. Grode*, 1996 S.D. 15, ¶ 6, 543 N.W.2d 795, 799 (quoting *Abrams v. Abrams*, 516 N.W.2d 348, 352 (S.D. 1994)).³ “Abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence.” *Taylor v. Taylor*, 2019 S.D. 27, ¶ 14, 928 N.W.2d 458, 465. “An abuse of discretion ‘is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.’” *Id.* (quoting *Thurman v. CUNA Mut. Ins. Soc’y*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 616).

Kelly’s primary claim of error is that the “Circuit Court effectively treated the homesite of each partner as though that partner possessed an individual interest in the Partnership’s real estate that the other partners did not.” Appellant’s Br. 14. Kelly then points to SDCL 48-7A-203, which states that “[p]roperty acquired by a partnership is property of the partnership and not of the partners individually.” While the circuit court may have considered that each of the brothers had a heightened interest in retaining their residences, nothing in the record demonstrates that the circuit court treated the homesites as though they were owned individually and not by the Partnership. And although the circuit court could have included the homesites in the private auction, it was well within its discretion to distribute the homesites prior to the rest of the Partnership assets. Kelly

3. This Court has utilized standards of review arising out of divorce proceedings to review decisions concerning partnerships dissolutions. *See, e.g., In re Dissolution of Midnight Star Enters., L.P. ex rel. Midnight Star Enters., Ltd.*, 2006 S.D. 98, ¶ 7, 724 N.W.2d 334, 336 (citing *Priebe v. Priebe*, 1996 S.D. 136, ¶ 8, 556 N.W.2d 78, 80) (this Court’s review of a divorce proceeding).

presents no authority that prohibits the circuit court from performing such distribution or that characterizes such action as arbitrary or unreasonable.

The circuit court's decision was not so unreasonable to classify the action as an abuse of discretion. While Kelly seems to argue that the circuit court was unreasonable because the land contiguous to Tim and Steve's homes would be better suited for a livestock operation—Kelly's preferred area of work—the same argument could be made if the circuit court made the homesites part of the private auction. If the homesites were a part of the private auction, Kelly could have presented the highest bid and Tim and Steve would have been confronted with a situation where Kelly had title and control over their homes. Considering the tension between the brothers, which the circuit court was fully aware of, this would have presented an untenable arrangement. Later on during its oral pronouncement of the distribution, the circuit court again emphasized that the matter surrounding the homesites was "contentious; and [the circuit court] simply wanted those parties to stay away from each other and have a safe place, preferably, to live." *SR* at 3510.⁴ Or, the homesites could have been included in the private auction, and Tim and Steve still could have ended up with their homesites.

The properties had to be distributed one way or another. And regardless of the method the circuit court used to distribute—be it an auction or allocating properties directly from the bench—the homesites were still included in the overall distribution

4. The circuit court also heard evidence that Kelly drove his pickup into one of Tim and Steve's pickups in the summer of 2018, used a tractor to damage neighbors' property, and had a temporary protection order entered against him by his brother Travis. *SR* at 170, 3249-50. Appellees include this information not to have the Court judge Kelly's character, rather to demonstrate that the circuit court, after hearing this information, was acting reasonably when it distributed the homesites prior to trial.

scheme and the corresponding values were used in ensuring each brother received a third share of the Partnership assets. The situation would be different if the circuit court distributed the homes and did not account for those values later on in ensuring each brother received an equal share. But that is not what happened in this case. The circuit court's decision was not only reasonable but was the logical solution. Tim and Steve's homesites had higher valuations than Kelly's homesite, but the circuit court later ensured that each brother received an equal one-third distribution of the Partnership assets. The circuit court was wholly within its discretion when it distributed the homesites prior to the private auction, and its decision should be affirmed.

II. Whether the circuit court erred in its valuation and allocation of certain Partnership assets.

Kelly contends the circuit court erred in its valuation of 1) the Partnership's hay inventory, 2) the expenses allocated to Kelly, and 3) the homesites. Each of these will be addressed in turn.

The Court's "review of a circuit court's valuation of property is clearly erroneous." *In re Dissolution of Midnight Star Enters., L.P. ex rel. Midnight Star Enters., Ltd.*, 2006 S.D. 98, ¶ 7, 724 N.W.2d 334, 336 (citing *Priebe v. Priebe*, 1996 S.D. 136, ¶ 8, 556 N.W.2d 78, 80). However, "[w]hether the circuit court used the correct method of determining fair market value is a question of law reviewed de novo." *Id.*

A. The circuit court's valuation of the hay inventory was not erroneous.

In the fall of 2018, Kelly hired Wieman Land and Auction to appraise the hay inventory of the Partnership. Kelly guided the appraiser around the various Partnership properties to take account of the hay inventory. *SR* at 469. In total, Wieman appraised the hay inventory at \$34,915. *SR* at 470. The circuit court determined Tim and Steve

held that much value of hay and allocated \$34,915 to Kelly in the final distribution. *SR* at 2851. This amount of \$34,915 was supported by the evidence, was not clearly erroneous, and was agreed to in testimony by Tim. *SR* at 3288-89.

Kelly, however, claims that Tim and Steve sold or concealed an additional 2,150 tons of hay from the appraisal. Appellant's Br. 18. Further, he claims the circuit court erred because "it faulted Kelly (and Wieman) for not including the missing hay bales in the Wieman auction count." Appellant's Br. 19. While discussing the value of hay inventory during trial, the circuit court reasoned

When I look at Exhibit 8, the Wieman appraisal, as it relates to the bales, I think it's important to note that that expert was hired by [Kelly]; and that it states right in the report, written by the expert, "I was brought from location to location by Kelly Jackson, and listed the items that he had indicated needed to be inventoried and appraised."

Any shortage of - - or unnoticed bales certainly, I think, fall at the feet of him. If there was something else, *which this Court doesn't necessarily believe there was*, certainly he had the opportunity at that time to have it appraised and valued. It was testified by the other parties that those bales in the shed belonged to somebody else. And that's the finding of the Court.

SR at 3513-14. (emphasis added). The circuit court said that if Kelly wanted additional hay in the report he had the opportunity to do so by showing it to Wieman. But there was no other Partnership hay to show. Aside from the photographs he took of the hay—which were blurred and without date stamps—and his own belief, Kelly had no other evidence that there was additional hay inventory. Tim testified that hay accounted for in the Wieman appraisal was ultimately moved back to Steve's homesite because that is where they fed the livestock. By moving the hay back to Steve's homesite, Kelly had the opportunity to double photograph the hay; once at its original location and another at Steve's homesite.

No other hay was transported and sold without Kelly's knowledge, and Tim testified that moving such a large inventory of hay would be an extensive operation—one Kelly would surely notice. Further, the forensic audit did not detect any deposit for hay profits. The only evidence of other hay was the photographs, and the circuit court as the fact finder was best suited to weigh that evidence. *See Van Duysen v. Van Duysen*, 2015 S.D. 84, ¶ 12, 871 N.W.2d 613, 616. Other than the pictures, the record is void of evidence that Tim and Steve had other additional hay inventory. The circuit court's inventory and valuation of Partnership hay is supported by the record and should be affirmed.

B. The circuit court properly allocated expenses to Kelly.

In its Findings of Fact, the circuit court found “that Kelly received \$29,566 in value for various expenses paid by the partnership” and allocated such value in the Trial Score Card. *SR* at 5852. Kelly argues that “this Court should conclude the Circuit Court's finding as to these expenses is clearly erroneous, and the Circuit Court should be reversed.” Appellant's Br. 29. While “[a] trial court's findings of fact are reviewed under a clearly erroneous standard[,]” *Priebe*, 1996 S.D. 136, ¶ 8, 556 N.W.2d at 80, the Court “appl[ies] an abuse of discretion standard when the trial court's property division is reviewed.” *Id.* ¶ 9.

During trial, Appellees argued that Kelly received a benefit of \$44,866.15 from expenses incurred and paid for by Tim and Steve. These are verified and legitimate expenses accompanied by receipts. Appellees maintain this value on appeal. Appellees believe Kelly should have received an even greater value for expenses, but they recognize that the circuit court had ample discretion in allocating certain expenses to Kelly. *See id.*

¶ 9. The record does not demonstrate that the circuit court abused its discretion, and therefore, the expenses allocated to Kelly should be affirmed.

Kelly, on the other hand, contends that this issue should be reviewed under a clearly erroneous standard. Appellees disagree. Although the circuit court used “finds” in its Findings of Fact 29,⁵ “finds” was not used in a sense to invoke a clearly erroneous standard. The circuit court determined that Kelly received such value and allocated the expenses accordingly. Kelly does not argue the expenses were unsupported by evidence in the record. If he did, he would not concede that the amount allocated for expenses should have been \$12,448.70. Rather, Kelly’s argument centers on the amount the circuit court allocated to each brother. It is well-established that the circuit court has the power and discretion to divide property as it sees fit. The circuit court could have allocated the full \$44,866.15 worth of expenses, or it could have allocated \$0. The circuit court was within its discretion allocating a reasonable value for the expenses paid by Tim and Steve.

However, the circuit court’s allocation should be affirmed even if the Court applies a clearly erroneous standard. While the Findings of Fact do not set forth the circuit court’s exact calculations, there is sufficient evidence in the rest of the record to support the expenses value. Evidence was presented to support each of the expenses and the Court reviews the entire record—not just the circuit court’s oral pronouncement reviewed in isolation—when determining if a finding is unsupported by the evidence and clearly erroneous. *See, e.g., Springer v. Cahoy*, 2013 S.D. 86, ¶ 7, 841 N.W.2d 15, 19 (“A

5. “The Court Finds that Kelly received \$29,566 in value for various expenses paid by the partnership; accordingly, \$29,566 is entered for row 40 of Exhibit 1.” *SR* at 2852, paragraph 29.

finding is clearly erroneous when, *after reviewing the entire record*, we are left with a “definite and firm conviction that a mistake has been committed.”) (emphasis added). The value allocated to Kelly for expenses paid for by Tim and Steve should be affirmed.

C. The circuit court improperly valued the homesites.

The circuit court employed two separate methods for valuing certain Partnership assets. The homesites were appraised by a professional appraiser, Tom Meekins, who the brothers all agreed upon. The remaining assets were valued based on the winning bid procured on each item during the private auction. Although Kelly was content with the valuation Meekins placed on his homesite and Lane Lots, he contested the appraisal on Tim and Steve’s homesites, arguing the appraisal undervalued Tim and Steve’s homesites and the quarters of land that each received alongside their homes. As such, the circuit court, solely in regard to Tim and Steve’s homesites, averaged the per-acre price from the private auction with the per-acre price from the Meekins appraisal to configure new, higher valuations for the homesites. In addressing this issue, the circuit court stated:

I do agree that there was a significant advantage to the individuals who happened to live on a quarter versus [Kelly], who apparently doesn’t.

So what I did to try to determine a fair value to be paid: Exhibit 5 shows all of the pieces of property that were auctioned off in the family auction. And it shows things going from \$9,000 an acre, \$12,000 an acre, \$7,500 an acre, all the way down to \$6,350 an acre.

I was not going to cherry-pick the highest or the lowest. But in an effort to try to be fair to all the parties, I averaged all of the properties that were sold at the price per acre, and I averaged that out. That average comes to [\$]8,529 per acre.

I then looked at Exhibit D, which valued the properties at four thousand - - excuse me, on line 14, Steve’s home, at \$4,312 per acre. So then I averaged the [\$]8,529, the [\$]4,312, which comes to [\$]6,420.5 per acre. I used that amount to compute the price, the fair price for the property - - this is more than just what’s the valuation of the property. This is the dissolution of a partnership.

And I'm trying to treat the assets fairly for all the parties, and the same throughout the proceeding.

So line 14, I put in \$1,027,280 for Steve's property.

Likewise, for Tim's property, I did the exact same thing. There was some small differences. The appraisal in Exhibit F was [\$]4,150 per acre. When I averaged that with the [\$]8,529, that came to 6,339.5 dollars per acre, giving a purchase price -- or a valuation of \$1,007,981.

So what I tried to do was figure out, generally, how all the property was valued throughout the dissolution, with the added benefit, I guess, for [Tim and Steve] of all taking into consideration of the appraisals that were done.

SR at 3511-12.

“The circuit court must set a value and that value must be ‘based upon the evidence or within a reasonable range of values presented to [the court].’” *Farlee v. Farlee*, 2012 S.D. 21, ¶ 10, 812 N.W.2d 501, 503 (alteration in original) (quoting *Guthmiller v. Guthmiller*, 2003 S.D. 120, ¶ 6, 670 N.W.2d 516, 517). The averaging of the Meekins appraisal and the private auction bids was unreasonable and in error.

This Court has held that an objective, hypothetical transaction standard is superior to an actual buyer standard. *Dissolution of Midnight Star*, 2006 S.D. 98, ¶ 21, 724 N.W.2d at 338. And although *Dissolution of Midnight Star* addressed fair market value, *id.*, the Court's rationale seems to be applicable to the case at bar. As the Court explained,

[W]hat if a partnership solicited a “strawman” to offer a low price for the business? What if a businessman, for personal reasons, offers 10 times the real value of the business? What if the partnership, for personal reasons, such as sentimental value, refuses to sell for that absurdly high offer? These *arbitrary, emotional offers* and rejection cannot provide a rational and reasonable basis for determining the fair market value.

Id. at 338–39 (emphasis added). The private auction here saw three brothers—who already had pre-established tensions between them—participate in a distribution method

that was competitive and reactionary. As explained at trial, the “private auction included sibling rivalry, emotion, sentimental value.” *SR* at 3506. This seems to be the exact situation that prompted the Court to hold that actual buyer models “cannot provide a rational and reasonable basis for determining the fair market value.” *Dissolution of Midnight Star*, 2006 S.D. 98, ¶ 21, 724 NW.2d at 338-39. The Court’s rationale in *Dissolution of Midnight Star* theoretically could apply to any situation where a court is determining a reasonable and objective value to place on assets during a distribution or dissolution.

Furthermore, the brothers presenting high bids for assets were subject to less risk because each bid could essentially be discounted one-third, as the Partnership assets (or proceeds therefrom) were going to be distributed evenly amongst the three brothers. All of these circumstances make the circuit court’s method of valuation unreasonable and presents a valuation outside the range of reasonable values.

Tim and Steve (or his Estate) were prejudiced by the circuit court’s action. Meekins appraised Tim’s homesite at \$660,000 and Steve’s homesite at \$690,000. This was an objective market value produced by a certified appraiser who was chosen by stipulation of the parties. The circuit court increased Tim’s homesite to \$1,007,981 and Steve’s homesite to \$1,027,280. Each property increased more than \$300,000. Because Tim and Steve’s homesites were given higher evaluations, their overall distribution increased. As a result, the circuit court ordered Tim and Steve to jointly pay \$143,326 to Kelly as a true-up payment. If the Meekins appraisal remained on the homesites, the true-up payment would not have been warranted.

Kelly, on the other hand, claims the circuit court should have disregarded the Meekins appraisal entirely and only used the average per-acre price arising from the private auction. Appellant's Br. 17. By arguing as such, Kelly urges the Court to omit the only objective valuation produced regarding the homesites and ignore the reasoning laid out in *Dissolution of Midnight Star*. However, Kelly has not provided any authority for this proposition, and Appellees are unable to identify authority which supports the circuit court's action. In contrast, *Dissolution of Midnight Star, supra*, supports the use of the Meekins appraisal and disapproves of the average-value method deployed by the circuit court here. The circuit court's valuation of the homesites was in error.

Appellees nevertheless maintain that the court's distribution of the homesites was proper, the private auction was a valid method of distribution, and the auction was correctly completed. Accordingly, Appellees ask the Court to reverse the circuit court's valuation on the homesites and remand for the circuit court to recalculate the partner's one-third share values.

III. *Whether the circuit court erred when it determined that Tim and Steve owed \$0 to Kelly for equipment rent.*

The circuit court found "that Tim and Steve owe \$0 for use of partnership assets during the post-dissolution/windup phase of the partnership as reflected in row 23 of Exhibit 1." *SR* at 2851. Kelly's claim is derived from his claim of conversion and his claim for rent is an implied claim for damages arising from Tim and Steve's use of the equipment. "An award of damages is a factual issue to be determined by the [fact finder]." *Lamb v. Winkler*, 2023 S.D. 10, ¶ 34, 987 N.W.2d 398, 410 (emphasis added) (alteration in original) (quoting *Lord v. Hy-Vee Food Stores*, 2006 S.D. 70, ¶ 31, 720 N.W.2d 443, 454). The Court reviews "the circuit court's findings of fact under the

clearly erroneous standard of review.” *Paweltzki v. Paweltzki*, 2021 S.D. 52, ¶ 30, 964 N.W.2d 756, 765 (citation omitted).

The circuit court based its decision regarding equipment rent on the fact that Kelly did not produce “any credible evidence of exactly what was used, how long it was used, and what a fair value would be for that.” *SR* at 3514. “An injury and resulting damages must be shown with certainty and not left to conjecture or speculation.” 22 Am. Jur. 2d *Damages* § 339; *see also Lord*, 2006 S.D. 70, ¶ 31, 720 N.W.2d 443, 454 (“Damages must be reasonable and must be proved with reasonable certainty.”). As the circuit court identified, there was not any “credible evidence” that showed what equipment Tim and Steve used, how long they used it for, or how much rundown the alleged used caused. “The credibility of the witnesses, the import to be accorded their testimony, and the weight of the evidence must be determined by the trial court, and [this Court] give[s] due regard to the trial court’s opportunity to observe the witnesses and examine the evidence.” *Van Duysen v. Van Duysen*, 2015 S.D. 84, ¶ 12, 871 N.W.2d at 616 (citation omitted). The record is void of evidence which the circuit court could have used to sufficiently determine any damage Tim and Steve caused by their use of the equipment. Thus, the circuit court’s allocation of zero dollars for “rent” to Kelly should be affirmed.

IV. Whether the circuit court abused its discretion when it attributed the costs of a forensic audit solely to Kelly.

Early in the dissolution process, Kelly asked the circuit court to permit a forensic audit of the Partnership and to allocate the expense of such audit amongst the brothers. The circuit court allowed Kelly to hire a forensic accountant to complete the audit and assigned the expense solely to Kelly, although the circuit court did reserve the right to

later apportion the expenses to all three brothers based on the findings of the audit. Whether a circuit court erred in its distribution of property is reviewed for an abuse of discretion. *Feldhaus v. Schreiner*, 2002 S.D. 65, ¶ 9, 646 N.W.2d 753, 755 (citation omitted).

When considering Kelly's request for permission to have a forensic audit conducted, the circuit court stated that, "If [Kelly] feels one is necessary, I will allow him to pay for one. If something comes of that and you wish to make a motion to share that cost, I would allow; but I see nothing in the record at this point that would indicate that a forensic audit is needed." *SR* at 3068. The circuit court did not order Kelly to contract for a forensic audit, nor did the court think one was necessary. The circuit court permitted Kelly, who was not acting on behalf of the Partnership but rather acting for his own personal interest, to conduct one but made it clear that Kelly would be responsible for the payment.

Kelly hired a forensic accountant to conduct the audit, and Tim and Steve later hired their own expert. At trial, the circuit court allocated all of the expense of Kelly's expert to Kelly, stating, "Both parties hired experts. I see no reason to penalize one party for the other party's experts." *SR* at 3518. The circuit court distributed the cost of each expert to the partners who hired them. Kelly argues this was an abuse of discretion because "partners all share equally in partnership profits and expenses." Appellant's Br. 28. Further, he states the audit was an expense incurred for the Partnership's benefit. The forensic audit completed by Kelly's expert was not done for the benefit of the Partnership; rather, it was done in hopes that the value of Kelly's distribution would be higher. Appellees did not request Kelly to help pay for their expert. But even if they had,

the circuit court would have been within its discretion to deny the request. The circuit court's allocation of the expense associated with the forensic audit to Kelly should be affirmed.

V. Whether the circuit court properly concluded that Kelly's claim for damages to the Solberg property should have been asserted in a separate action.

Kelly sought relief from the circuit court for alleged damages caused by blocked drainage resulting from actions taken by Tim and Steve. Such actions allegedly took place after the private auction but before trial. Both Tim and Kelly testified about the issue, but the circuit court declined to rule on the issue, and instead instructed Kelly to pursue a claim of damages in a separate action. On appeal, Kelly claims the circuit court's decision was an error as a matter of law and should be reversed. His primary claim of error seems to be that "the Circuit Court's ostensible conclusion was that there was no legal remedy it could provide." Appellant's Br. 20.

The circuit court did not base its decision on whether there was a legal remedy available. Rather, the circuit court's decision was grounded in the reality that drainage issues are niche and complex issues that often require expert testimony and evidence. *See, e.g., Rumpza v. Zubke*, 2017 S.D. 49, ¶ 12, 900 N.W.2d 601, 606 (considering expert evidence when landowners allege damages arising from drainage issues). As the circuit court properly articulated, "If there is a drainage issue, that's a whole separate cause of action that the parties can deal with pursuant to the drainage laws; but that is not somewhere where the Court was willing to go." *SR* at 3510.

The case before the circuit court was initiated to oversee the windup of the Partnership. While the circuit court may have considered other claims of damages—i.e., fence removal—such claims do not require expert testimony to the degree a draining

issue would and the circuit court could readily make allocations for those damages. Further, the facts and circumstances of the windup are not such that would preclude Kelly from asserting the drainage issue in a later lawsuit. Based on the scope of a drainage claim and the likelihood that an expert would be needed, the circuit court was warranted in declining to address the drainage issue. Its decision to do so should be affirmed.

Furthermore, Kelly first asserted the drainage issue in the weeks leading up to the trial. *SR* at 3312. Not only was there a lack of notice regarding the drainage issue and insufficient time to adequately prepare for a trial, but Kelly also did not present any reports or expert opinions regarding the drainage or topography of the land. *Id.* The testimony concerning the drainage at trial was speculative and indefinite.

VI. Whether the circuit court properly concluded that certain actions taken by Tim and Steve were done so within the ordinary course of business.

One of Kelly's claims below was that Tim and Steve committed waste when they removed fencing from some of the Partnership property, and as a result, decreased the property's appeal for Kelly. He also argues that Tim and Steve caused waste when they "sprayed and killed Partnership crops prior to the parties' private auction." Appellant's Br. 24. The circuit court determined these actions were taken in the ordinary course of business. It is well-established that

A difference arising as to a matter in the ordinary course of business of a partnership may be decided by *a majority* of the partners. An act outside the ordinary course of business of a partnership . . . may be undertaken only with the consent of all of the partners.

SDCL 48-7A-401(j) (emphasis added). Because Tim and Steve accounted for a majority of the partners, their actions were proper.

However, Kelly argues that these actions were done outside the ordinary course of business and “that there was no legitimate Partnership purpose served by having [the fences] removed.” Appellant’s Br. 23. Questions involving whether an action is or is not taken within the ordinary course of business are mixed questions of law and fact. *Casey Ranch Ltd. P’ship (CRLP) v. Casey*, 2009 S.D. 88, ¶ 6 n. 2, 773 N.W.2d 816, 819 n.2 (citing *In re Nat’l Steel Corp.*, 351 B.R. 906, 913 (N.D. Ill. 2006)); see also *Matter of Gary Aircraft Corp.*, 681 F.2d 365, 374 n. 14 (5th Cir. 1982) (clarifying that “whether a sale is in the ordinary course of business is a mixed question of law and fact”). “The standards created to define and interpret the phrase ‘ordinary course of business’ involve questions of law.” *Id.* “However, what transpired between the parties both in the ordinary course of their business relationship and in the transactions at issue is a question of fact.” *Id.*

With regard to the fence removal, the Partnership was prompted by the County to remove some of the fence because the fence was encroaching on a right-of-way. *SR* at 3304. The fence had to be moved. Other fences were poor quality because of the age of the fence and the Partnership had already discussed removing the fences before Tim and Steve gave their notice of withdrawal. *SR* at 3307-08. These actions are readily categorized as ordinary course of business as they deal with maintenance and liability of Partnership assets, and there is evidence in the record to support Tim and Steve’s rationale for removing the fences. Therefore, the decision only required a majority vote of the partners, sufficiently achieved by Tim and Steve.⁶

6. During Kelly’s testimony, he described some fence that had been removed after the private auction on land that was bid on and won by Steve. *SR* at 3180. As the

Kelly also contends that Tim and Steve committed waste when they sprayed the alfalfa and fescue grass crop. As the circuit court recognized, the alfalfa and fescue grass each had “lived its life cycle.” *SR* at 3515. Both crops had been planted for five plus years. The crops were no longer producing sufficient yields and a majority of the partners agreed that it was appropriate to remove the alfalfa and fescue grass and plant new crops that would produce higher yields. Kelly’s claim that these actions were done without any legitimate reason is inapposite with the facts of the case. The removal of the fences, alfalfa, and fescue grass was a management decision concerning the Partnership’s assets and operations. Because these decisions were made in the ordinary course of business, only a majority of the partners had to agree. Tim and Steve accounted for a majority, and, as such, this Court should affirm the circuit court’s determination that these actions were proper.

VII. Whether the circuit court properly denied Kelly’s motion to enforce the cash default provision of the private auction terms.

Prior to the private auction, the parties negotiated certain terms for how the auction would proceed. Within these terms, Tim and Steve asserted a “cash default” provision, which reads:

1. The heavy partner loses a non-homestead parcel of land of the light partner’s choosing.
2. The light partner may “purchase” (take a distribution credit) that parcel at the tax assessed value and move that parcel into his asset column.
3. Alternatively, if there are no parcels of the heavy partner that the light partner desires, a parcel of the heavy partner’s choosing will be sent to public auction.
4. This parcel shift will necessarily impact the equalization payment, so that needs to be accounted for in the true-up.

circuit court pointed out, “[Steve] owned it, he has a deed, and he did something to it. . . . I’m not going to do anything with that. *SR* at 3181.

5. This process is repeated until whomever is the heavy partner is able to make the equalization payment to the light partner. This arrangement should incentivize bidding within one's budget and mobilizing capital between the auction and true-up.

SR at 2872. Following the circuit court's March 26, 2024, Judgment, Tim and Steve's distributions exceeded Kelly's, or were "heavy," by \$143,326.00. This then required Tim and Steve to pay Kelly a true-up payment to equalize the distributions. On June 26, 2024, Kelly filed a motion to enforce the cash default provision. Following a motions hearing in July 2024, the circuit court issued a judgement denying Kelly's motion to enforce the cash default, and it cited Kelly's lack of correspondence with Appellees to secure the payment. On appeal, Kelly argues that "the Circuit Court did not clearly articulate its findings[,] and that "neither the 'cash default' provision, nor the Circuit Court's Judgment, contain[] such a [notice] requirement."

Kelly advances a de novo review of this issue, citing this Court's prior decision in *Wichman v. Shabino*, 2014 S.D. 45, ¶ 5, 851 N.W.2d 202, 203, under the premise of a motion to enforce a judgment. Appellant's Br. 31. Kelly did not advance a motion to enforce the judgment. He filed a motion to enforce the cash default provision. The cash default provision, exhibited above, was meant to primarily ensure that the brothers' bids were within their means, but also to streamline the transfer of assets to the brothers following the auction. However, the default provision contained neither a date nor an event that triggered the effect of the provision. The provision also did not refer to any due date where the assets had to be transferred following the final judgment. Further, neither the circuit court's judgment nor its orders incorporated the default provision.

Tim and Steve transferred the true-up, or equalization, payment to their attorney's trust account in February 2024 shortly after trial. Receipt of the payment was provided to

the circuit court. At the July 2024 hearing on the motion to enforce the cash default the provision, the circuit stated

The money was in the trust account. It was available. When I read those emails, I find [Appellees' attorney's] interpretation that, "Hey, you guys were discussing all of this" as reasonable; and, frankly, I think a simple email, saying, "Hey, can you send us the check?" probably would have got that done.

SR at 3051. Furthermore, at the time Kelly's motion to enforce the cash default provision was filed and heard, Kelly and his counsel still had yet to deliver deeds to retitle parcels of land following the private auction and trial. The understanding, as recognized by the circuit court, was that the true-up would be transferred simultaneously with the delivery of the deeds. Instead, Kelly filed the motion to enforce cash default provision without any correspondence with Appellees or Appellees' counsel regarding the true-up payment. Even more troubling was this claim in light of the parties' extensive communications regarding execution and delivery of the deeds.

Appellees have been unable to find any authority to support Kelly's procedure. A *de novo* review seems appropriate—that is, if the motion to enforce the cash default provision was even procedurally permitted—, but Appellees argue that such a review premised on a motion to enforce a judgment⁷ is not appropriate, legally deficient, and unfitting with the facts of the case. The cash default provision was not a part of the circuit court's judgment, and even if it had been, there was not any language in the

7. Kelly cites the Court's decision in *Wichman v. Shabino*, 2014 S.D. 45, ¶ 5, 851 N.W.2d 202, 203–04, as support for a *de novo* review of a motion to enforce a judgment. Appellant's Br. 31. *Wichman* cites *Holsti v. Kimber*, 2014 S.D. 21, ¶ 8 n. 2, 845 N.W.2d 923, 927 n. 2, as support. However, the cite to *Holsti* pertains to the Court's review of summary judgment and statutory interpretation, which are well-established *de novo* reviews. *Id.* Under these circumstances, a genuine question exists whether a motion to enforce a judgment receives a *de novo* review.

provision that specifically identified when the consequences would take effect. This was an agreement between the parties.⁸ The true-up money was in the firm's trust account, and it was transferred immediately after Appellees received notice of the motion to enforce the cash default. Prior to the motion, Appellees had not received any request for payment of the true-up. As counsel for Appellees stated during the July 2024 motions hearing, "[Appellees] have been ready, willing, and able to pay [the] cash equalization payment all along." TR 8. Kelly's use of the cash default provision, in this circumstance, seems to be a backdoor ploy to obtain additional real property that he did not receive pursuant to the private auction.

Instead, the Court should review this issue de novo as a pure question of law, considering whether the motion to enforce the cash default provision was invalid. *See, e.g., McGregor v. Crumley*, 2009 S.D. 95, ¶ 15, 775 N.W.2d 91, 95 (reviewing questions of law de novo). Regardless of what standard the Court reviews this issue with, the circuit court's denial of the motion to enforce the cash default provision was supported by law and the facts. The cash default provision did not have any trigger language, and the money was transferred upon notice of the motion to enforce the cash default. The true-up payment would have been transferred well before the motion had Kelly simply requested the payment. The circuit court's decision to deny the motion to enforce the cash default provision was not in error and should be affirmed.

8. Without considering the merits, Kelly's claim regarding the cash default provision seems more sound in a separate breach of agreement suit. Although Appellees argue the claim would be unsuccessful, a breach cause of action seems more apt than the current motion to enforce. *See, e.g., Paweltzki*, 2021 S.D. 52, ¶ 28, 964 N.W.2d at 764 (the Court's review of a purported settlement agreement and motion to enforce).

VIII. Whether the circuit court erred in its recognition and valuation of Partnership grain⁹

The circuit court found that Tim and Steve received \$446,229 in corn inventory and \$101,949 received in oats inventory. The Court reviews these findings of fact for clear error. *See Paweltzki*, 2021 S.D. 52, ¶ 30, 964 N.W.2d at 765 (citation omitted).

During the windup process, Kelly asserted multiple and varied theories of fraud and embezzlement to advance the idea that Tim and Steve concealed stored grain in order to decrease Kelly's one-third share of the Partnership assets. However, all these claims ever amounted to and continue to amount to are theories unsupported by the facts of the case. There was no credible evidence presented to the circuit court that demonstrated Tim and Steve withheld stored grain from the partnership dissolution process.

The issue turns on the Partnership's grain inventory in 2014. In particular, the question is whether any excess grain from 2012-2013 was carried over to 2014. Because the Partnership records did not indicate what the grain inventory was at the time of the dissolution, the experts made estimations based on acres planted and grain sold. In making such estimations, they needed a year to begin their calculations. The experts' estimations used 2014 as the first year accounted for when estimating the grain inventory during the years of the windup.

The only concrete evidence presented at trial of the initial grain inventory in 2014 came from Tim, who testified that the Partnership did not have any grain inventory following 2013. The Partnership either sold the excess grain or fed it to the livestock. Accordingly, the Partnership began 2014 with zero grain inventory. However, the Eide

9. Appellees' Notice of Review was filed with the Court on August 30, 2024.

Bailly report produced by Eric Hansen stated that the Partnership began 2014 with nearly 60,000 bushels of corn and 54,000 bushels of oats at full capacity or 30,000 bushels of corn and 27,000 bushels of oats at half-capacity. *SR* at 498. Tim testified that not only would these bushels be factually impossible because of the number of acres the brothers farmed, *SR* at 3275, but the Eide Bailly report also did not take into account the number of acres that were chopped for silage and feed. *SR* at 3276. The report took the total yield (an estimation), deducted the amount sold, and assumed the rest was all kept by the Partnership. *SR* at 493-500.

Following the Eide Bailly report, Tim and Steve employed Roger DeRouchey as an expert to assess the Partnership's grain inventory. While DeRouchey's numbers were more accurate, he too stated that the brothers brought grain inventory into 2014. Furthermore, after DeRouchey produced his report, Hansen produced a second report incorporating most of DeRouchey's findings.

Hansen obtained the information he used in his report exclusively from Kelly, and as Kelly testified at trial, he had relatively no concrete knowledge about the grain operation. For instance, when asked if he knew how much grain had spoiled, Kelly testified that, "I wasn't in charge of the [grain] bags. I didn't have control of them. I had no way of knowing." *SR* at 3234. Further, he stated that, "I did not have control of the grain. I have not sold any grain. The only tool I have to establish the amount of the grain is Eric Hansen. That's it." *SR* at 3247. Kelly's belief that there was initial grain inventory has no reliance on facts, but rather on emotion and tension arising from the brothers' deteriorating relationship, and any report that had the Partnership beginning 2014 with initial grain inventory is therefore faulty. If Tim and Steve had concealed

stored grain and later sold it for a profit, the forensic audit would have uncovered such activity. The financial sophistication needed to successfully maneuver this type of scheme and not leave any trace of evidence would be extraordinary. Hansen, who has a law enforcement background and specializes in these types of forensic audits, was not able to uncover any suspicious grain activity. Further, the Eide Bailly report found no discrepancies in any of the financial records of the Partnership that would resemble a fraud scheme.

Kelly points out that the circuit court found Hansen to be the most credible, but such a finding does not automatically validate Hansen's report. Tim and Steve acknowledge that Hansen was the more professionally polished witness. However, his report was built on Kelly's theories and hypothetical calculations and estimations. Again, Kelly's theory that Tim, Steve, Paul, and Eric were embezzling grain from the Partnership is unsubstantiated and neither expert, including Kelly's expert, identified any fraud or embezzlement within the Partnership. The only concern Hansen testified to was that the Partnership did not have the best bookkeeping practices. Any theory of fraud or embezzlement based on the testimony at trial was purely speculation and conjecture.

Furthermore, Hansen assumed the Partnership's Quonset was used solely for grain storage. *Id.* However, Kelly confirmed during his testimony that the Partnership also kept "planters, semis, seed for planting, beehives, cattle minder. . . . 'You name it, we kept [it] in the Quonset.'" *SR* at 3235. Additionally, Eric stated that the Partnership used the Quonset for grain storage "a few times here and there[,] but the Quonset was rarely used for grain storage after the Partnership purchased bagging equipment in 2010 and 2011. *SR* at 3460-61. Even if there was some grain in the Quonset to begin 2014, there

was not any testimony or evidence to support Hansen's assumption that the Quonset was only used for grain storage. Indeed, each of the parties to the case, as well as other witnesses with first-hand knowledge of the Partnership operation, testified that the Quonset was used to store equipment and other items.

Hansen misunderstood the nature of the Partnership's use of the Quonset. Considering the fact that the report was premised on this misunderstanding, coupled with Tim's testimony that grain was nonexistent at the beginning of 2014, both experts' reports are called into question. "The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and proves nothing if its factual basis is not true. It may prove little if only partially true." *Hughes v. Dakota Mill & Grain, Inc.*, 2021 S.D. 31, ¶ 23, 959 N.W.2d 903, 910; *see also Charlson v. Charlson*, 2017 S.D. 11, ¶ 32, 892 N.W.2d 903, 912. Without the expert reports, the circuit court had no evidence or factual basis to award Kelly value for stored grain. Therefore, the circuit court's findings concerning stored or leftover grain are clearly erroneous as a matter of law. The Court should reverse the circuit court's allocation of value to Kelly with regard to any benefit Tim and Steve received from stored grain.

CONCLUSION

The circuit court permissibly distributed the homesites prior to the private auction and properly valued and distributed such value concerning the Partnership's hay inventory and expenses paid for by Tim and Steve. Further, the circuit court acted properly when it denied Kelly's claim for "rent" damages, declined to address the drainage issue, and assigned the costs of the Eide Bailly forensic audit to Kelly. These decisions are all supported by facts and law and, therefore, should be affirmed.

In contrast, the court's method for determining the value allocated to the homesites was improper and without authority. Additionally, the circuit court's valuation and allocation of grain inventory was in error. These decisions should be reversed, and the case should be remanded with limited instructions for the circuit court for the circuit court to recalculate the brothers' shares and order an equalization payment accordingly.

REQUEST FOR ORAL ARGUMENT

Appellees request oral argument on all of the issues set forth above.

Dated at Mitchell, South Dakota, this 19th day of December, 2024.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that *Appellee's Brief* complies with the type volume limitations set forth in SDCL 15-26A-66. *Appellees' Brief* uses Times New Roman in 12-point font and was produced using Microsoft Word 365. *Appellees' Brief* contains 9,409 words and 47,206 characters, not to include the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, any certificates of counsel, and any addendum materials. I have relied on the Microsoft Word processing system to determine the word and character count.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Appellee's Brief* was filed electronically with the South Dakota Supreme Court and that the original was filed by mailing the same to 500 East Capitol Avenue, Pierre, South Dakota, 57501-5070, on the 19th day of December, 2024.

I further certify that on the 19th day of December, 2024, a true and correct copy of *Appellees' Brief* was served via Odyssey File and Serve upon:

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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 30803

KELLY JACKSON,

Plaintiff/Appellant,

vs.

**TIM JACKSON, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF STEVE JACKSON,**

Defendants/Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Jerauld County, South Dakota

The Honorable Patrick T. Pardy, Presiding Judge

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Notice of Appeal filed August 13, 2024

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ARGUMENT

I. The Circuit Court Abused its Discretion When it Distributed Partnership Real Estate Prior to the Parties' Private Auction

The Court should conclude the Circuit Court abused its discretion when it distributed certain real estate (*i.e.*, the “homesites”) owned by the Jackson Brothers Partnership (the “Partnership”) without providing the partners with an equal opportunity to obtain the properties. *Priebe v. Priebe*, 1996 S.D. 136, ¶ 9, 556 N.W.2d 78, 80 (applying the abuse of discretion standard to the division of property). South Dakota law unambiguously recognizes that “[p]roperty acquired by a partnership is property of the partnership *and not of the partners individually.*” SDCL § 48-7A-203 (emphasis added); *see also* SDCL § 48-7A-501 (“A partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily”).

The Circuit Court distributed the homesites to the individual partners and without giving the partners an opportunity to bid on or otherwise acquire the real estate, despite providing that opportunity with respect to every other piece of real estate owned by the Partnership. In effect, the Circuit Court treated the homesites as if the partner living there possessed a special interest in the property as compared to the other partners, which is contrary to South Dakota law. SDCL § 48-7A-203; SDCL § 48-7A-501. Kelly testified at trial that the properties given to Tim and Steve were more desirable to him because those properties were each improved with corrals, fences, and other facilities for raising livestock, and he was the partner most heavily involved in the Partnership’s livestock operations. Tr. 69:18-19; 73:3-4; 83:9-14. As a result, this put Kelly at a distinct disadvantage when the properties were divided up, and he would have been willing to

purchase either Tim's or Steve's homesite at the highest value at the parties' private auction if given the opportunity. Tr. 83:4-9. In addition, Tim and Steve subsequently removed most of the improvements from the homesites they received, which is wasteful and would not have occurred if Kelly purchased the land. *See infra*.

Tim and Steve do not dispute any of the foregoing. Rather, Tim and Steve view the Circuit Court's discretion as limitless, and so long as the Circuit Court distributed the property in some fashion and at some time, then the manner in which the Circuit Court did so is beyond reproach. Yet, South Dakota law is clear that these properties belonged to the Partnership and the partners had no individual interest in them, and by definition "[d]ecision and actions exceeding the bounds of authority constitute an abuse of discretion." *Iversen v. Wall Bd. of Educ.*, 522 N.W.2d 188, 193 (S.D. 1994). Here, the Circuit Court simply but arbitrarily distributed to each partner the real estate where that partner was currently living, and without ever giving the other partners an equal opportunity to acquire what were undisputably Partnership assets that no partner had any greater claim to than the others.

Tim and Steve's view also effectively treats these properties as fungible assets. However, one of the most familiar maxims in law is its recognition that each piece of land is unique. *In re Estate of Siebrasse*, 2002 S.D. 118, ¶ 9, 652 N.W.2d 384, 386 ("No two pieces of land are alike"). Kelly's uncontroverted testimony that he was willing to pay a premium for the properties distributed to Tim and Steve because of how the properties were suited for raising livestock illustrates this reality and highlights the arbitrary nature of the Circuit Court's decision.

Finally, Tim and Steve suggest the Circuit Court was attempting to avoid conflict when it distributed these parcels. In support, Tim and Steve refer to generalized comments made by the Circuit Court following the bench trial in January 2024, which was nearly six years after the 2018 Order. These after-the-fact statements obviously were not incorporated into the 2018 Order, and “oral pronouncements or written memoranda of a trial judge, which are extraneous to the formal findings and judgment, are of no binding force or effect.” *Lien v. Lien*, 420 N.W.2d 26, 28 (S.D. 1988). Nonetheless, even if this alleged concern animated the Circuit Court’s 2018 Order, it could have accomplished the same objective and without prejudice to the partners by allowing the partners to continue residing where they were and by withholding an exchange of deeds until the windup process was completed. Notably, this latter concept—withholding an exchange of deeds until the process was complete—is precisely what the parties did. Again, this illustrates the inequitable and arbitrary nature of the Circuit Court’s decision with respect to the homesites. Thus, the Court should conclude the Circuit Court abused its discretion by distributing these Partnership assets without providing each partner with an opportunity to obtain them.

II. The Circuit Court Erred in its Valuation and Distribution of Other Partnership Assets Following Trial

A. The Circuit Court Erred in its Valuation of the Parties’ Homesites

Assuming the Court disagrees that the Circuit Court erred when it distributed the homesites prior to the parties’ private auction, then the Court must still review how those properties were valued. *Priebe*, 1996 S.D. 136, at ¶ 8 (providing for clear error review). The parties agree the Circuit Court erred in its valuation of the homesites, but disagree on

how the Circuit Court should have treated the Meekins appraisals, which the Circuit Court directed the parties to obtain. *See* 2018 Order, § 4.a.

The Circuit Court should have disregarded the Meekins appraisals altogether and determined the value of Tim's and Steve's homesites solely based on the average per-acre prices of the other Partnership real estate from the private auction. This real estate was all in the same vicinity as Tim's and Steve's homesites, and the Circuit Court recognized using the Meekins figures would not be reasonable or equitable. Finding of Fact, ¶¶ 12-14. However, by nonetheless including the materially lower Meekins figures, the Circuit Court artificially and inequitably depressed the values of Tim's and Steve's homesites by over \$1.325 million to Kelly's detriment by approximately \$660,000.00 in total.

Tim and Steve contend the Circuit Court should have *only* relied on the Meekins appraisals. They suggest the Meekins appraisals were the only objective, market-based evidence of the value of these properties, and so the Circuit Court erred by considering any other approach.

This argument is flawed for several reasons. One, it ignores that there is no "market" for this real estate: the Partnership's assets were only divided among the partners, and so there is no reason to assess what price the homesites would garner on an open market. Second, there is likewise no rationale for *only* valuing the homesites in that fashion. If the Circuit Court intended to take a market-based approach to valuing the Partnership's real estate, then it would have needed to apply that methodology to *all* parcels, rather than only an arbitrary few. But, as the Circuit Court correctly noted, valuing only the homesites in this fashion was unreasonable. Finding of Fact, ¶¶ 12-14.

However, the Circuit Court should have excluded the Meekins appraisals, and its refusal to do so significantly and inequitably prejudiced Kelly. Thus, this Court should be left with a “definite and firm conviction that a mistake has been committed” by including the Meekins appraisals, and the Circuit Court should be reversed. *Eagle Ridge Ests. Homeowners Ass'n, Inc. v. Anderson*, 2013 S.D. 21, ¶ 12, 827 N.W.2d 859, 864.

B. The Circuit Court Erred in its Valuation of Partnership Hay Inventory

The Court should conclude the Circuit Court’s valuation of Partnership hay was clearly erroneous. *Priebe*, 1996 S.D. 136, at ¶ 8. As noted in Kelly’s opening Brief, there was conflicting evidence over the amount of Partnership hay at issue, and Kelly presented evidence showing Tim and Steve removed approximately 2,150 tons of hay bales prior to the Wieman appraisal that was completed in October 2018. As result, those bales could not be counted by Wieman. Kelly estimated the value of this hay to be approximately \$656,000.00 in 2017 prices. Tr. 127:2-128:13.

Tim and Steve focus on the conflicting evidence concerning the hay inventory. However, that conflict is irrelevant because the Circuit Court never resolved it by crediting one party’s evidence over the other. Instead, the Circuit Court simply faulted Kelly (and Wieman) for not including the missing hay bales in the Wieman appraisal, which ignores the impossibility that there was no way for Wieman to appraise assets that no longer existed. Consequently, there is no conflict in the evidence that can be resolved in favor of the Circuit Court’s finding that the missing hay could have been appraised after it had been removed. *Priebe*, 1996 S.D. 136, at ¶ 8. Accordingly, the Circuit Court committed clear error by excluding the missing hay bales on this basis. *Eagle Ridge*, 2013 S.D. 21, at ¶ 12. Therefore, the Circuit Court should be reversed.

C. **The Circuit Court Erred as a Matter of Law Regarding Post-Auction Damage to the Solberg Property**

The Circuit Court heard evidence concerning Tim's and Steve's removal of a drainage ditch from the "Solberg" property, which they waited to accomplish until after Kelly had selected that property at the parties' private auction but prior to the exchange of deeds for the properties. Accordingly, this land was still Partnership real estate at the time of trial. SDCL § 48-7A-203. Kelly testified that filling in the drainage ditch put the Solberg property at risk of flooding, which is why it was needed in the first place, and Kelly estimated that removing the drainage ditch made the Solberg lot less useful for farming and reduced its value by 30%. Tr. 84:10-16; 85:10-13; *Coyote Flats, L.L.C. v. Sanborn Cnty. Comm'n*, 1999 S.D. 87, 596 N.W.2d 347, 352 (recognizing a landowner may testify to the value of his or her land).

The Circuit Court did not dispute or discredit any of Kelly's testimony, but it refused to grant any relief because, in the Circuit Court's view, any claim for damage to the Solberg lot "need[ed] to be pursued in a separate civil action." Finding of Fact, ¶ 8. While not clearly stated, the Circuit Court's apparent conclusion was that there was no legal remedy it could provide, which is a conclusion of law subject to de novo review. *Burkhart v. Lillehaug*, 2003 S.D. 62, ¶ 9, 664 N.W.2d 41, 42. In contrast, Tim and Steve suggest the Circuit Court felt this issue was too complicated for it to resolve, which is neither supported by any citation to the record nor can it be squared with the fact that the Circuit Court went on to address similar allegations of waste and damaged Partnership property, such as Tim's and Steve's removal of Partnership fences, corrals, and cropland. See Finding of Fact, ¶ 25.

Further, the Verified Complaint sought relief for any act of Tim or Steve that “in any way destroy[ed] or deconstruct[ed] the partnership real estate and the improvements located on the partnership real estate, without the express permission of the Court.” SR. 8 (Verified Complaint, ¶ 13). Accordingly, these issues were squarely before the Circuit Court, and there is no justification for its refusal to address Tim’s and Steve’s removal of the drainage ditch from Solberg, which was an improvement to Partnership real estate.

In addition, the relief sought by Kelly was consistent with the Partnership’s windup. That is, Kelly requested either: (1) for the diminishment in Solberg’s value to be accounted for in his 1/3 allocation of Partnership assets which, at 30%, would be an offset of \$420,000.00. This is precisely the type of exercise engaged by the Circuit Court when it addressed the other allegations of waste and valuation of Partnership assets. Alternatively, (2) Kelly asked the Circuit Court to swap ownership of the Solberg land with the Holtus land (which Steve selected and which had a similar value) to ensure the parties who damaged the Solberg land bore the consequences for doing so. Again, the parties waited to exchange deeds until the windup was completed, and so the Circuit Court could have selected either option. Either way, this Court should conclude the Circuit Court erred as a matter of law when it declined to provide any relief for damage to the Solberg property. Thus, the Circuit Court should be reversed.

D. The Circuit Court Erred in its Valuation of Rent Owed to the Partnership

The Court should conclude the Circuit Court’s valuation of equipment rent owed to the Partnership was clearly erroneous. *Priebe*, 1996 S.D. 136, at ¶ 8. The Circuit Court was presented with two calculations on the value of Partnership equipment used by Tim and Steve for their own personal farming operations in 2017: (1) Kelly estimated this use

of Partnership equipment – which encompassed all of its equipment except for a John Deere tractor – devaluated that equipment by 10%, or \$600,000.00. Tr. 137:5-7; Tr. Ex. 17 (tab 26). Accordingly, Kelly asserted a claim for 1/3 of this amount, or \$200,000.00. Tr. 137:8-10. Alternatively, (2) Tim believed the value of the equipment he and Steve used was \$42,000.00 based on his estimate of hourly rental rates. Tr. 221:22-25.

Tim and Steve suggest, contrary to Tim’s own testimony, that these damages were not established with reasonable sufficiency. *See FB & I Bldg. Prods., Inc. v. Superior Truss & Components, a Div. of Banks Lumber, Inc.*, 2007 S.D. 13, ¶ 20, 727 N.W.2d 474, 480. However, aside from the dollar amount, Tim and Steve cannot dispute using the Partnership’s equipment in 2017 for personal gain, they do not dispute using all of the Partnership’s equipment (minus the John Deere tractor), and they cannot disavow Tim’s own estimation of the rental value of that equipment. Therefore, while there was a conflict of evidence over the rental value of Partnership equipment, there was no evidence to suggest the value was \$0, or that no Partnership equipment was used by Tim and Steve for personal purposes. Nonetheless, the Circuit Court awarded \$0 for their use of Partnership equipment. Finding of Fact, ¶ 24. The Court should conclude there is no conflict in the evidence that can be resolved in favor of the Circuit Court’s finding. *Priebe*, 1996 S.D. 136, at ¶ 8. Consequently, the Circuit Court should be reversed.

E. The Circuit Court Erred When it Held the Removal of Partnership Assets Was Done in the “Ordinary Course of Business”

There is no dispute Tim and Steve removed several Partnership fences, corrals, and crops shortly after giving notice of their withdrawal from the Partnership. According to the Circuit Court, their decision to do so was an ordinary “partnership decision” that required only a majority of the partners to make. Finding of Fact, ¶ 25. This issue is

governed by SDCL § 48-7A-401(j). If destroying several miles of long-standing fences needed for the Partnership's decades-old livestock operation on the eve of dissolution is truly an "ordinary course of business," then only a majority of partners need to agree; otherwise, it would be a decision that requires unanimous consent of all partners. *Id.*

Whether an activity falls within the "ordinary course of business" can present a mixed question of law and fact. *Casey Ranch Ltd. P'ship (CRLP) v. Casey*, 2009 S.D. 88, ¶ 6, n.2, 773 N.W.2d 816, 820. Specifically, "[t]he standards created to define and interpret the phrase 'ordinary course of business' involve questions of law." *Id.* (quoting *In re National Steel Corp.*, 351 B.R. 906, 913 (N.D. Ill. 2006)). "However, what transpired between the parties both in the ordinary course of their business relationship and in the transactions at issue is a question of fact." *Id.* (quoting *In re National Steel Corp.*, 351 B.R. at 913).

Tim testified he and Steve removed these assets to shift the Partnership's operations away from livestock. Tr. 225:1-5; Tr. 232:16-18. Tim explained that he and Steve intended to discontinue the livestock operation. Tr. 307:2-11. While Tim and Steve now attempt to offer up different rationales in their Brief, these contentions were not substantiated at trial and the Circuit Court did not issue any findings that credited them. In addition, it is unclear from their Brief if Tim and Steve are referring to the same assets under consideration, as only the improvements that were removed prior to the private auction were at issue. *See* Tr. 104:15-105:12. Nonetheless, the Circuit Court's view was that the removal of these assets was an "ordinary course of business" decision for a majority of the partners to make.

Importantly, the partners had been farming together since the early 1990s, Tr. 68:15-17, and Kelly was most heavily involved with its livestock operations. Tr. 72:23-73:4. Based on Kelly's testimony—which Tim and Steve did not question here—the value of the fences, corrals, and crops removed by Tim and Steve was approximately \$454,180.00.

Irrespective of the value of these assets, the effect of removing them was to discontinue one of the Partnership's major historical business practices that had been in place for over thirty years, while at the same time the partnership was entering the dissolution phase. As such, this is not a mundane matter of "the sort occurring in the day-to-day operation" of the Partnership. *JTM Enterprises v. Oddello Indus., LLC*, 2023 WL 8281841, at *8 (Tenn. Ct. App. Nov. 30, 2023). Rather, it constituted a significant "deviat[ion] from the regular course of business" of the Partnership. *MidWestOne Bank & Tr. v. Com. Fed. Bank*, 331 B.R. 802, 827 (S.D. Iowa 2005). Therefore, these activities were "outside the ordinary course of business of [the] [P]artnership" and could "be undertaken only with the consent of all of the partners," which here does not exist. SDCL § 48-7A-401(j). Thus, the Circuit Court erred as a matter of law when it held otherwise, and the Circuit Court must be reversed.

F. The Circuit Court Abused its Discretion When it Refused to Apportion the Cost of a Forensic Audit Among the Partners

The Court should conclude the Circuit Court abused its discretion when it refused to apportion the costs of a forensic audit among the partners. *Priebe*, 1992 S.D. 136, at ¶ 9. There is no dispute the Circuit Court had the authority to apportion the cost of the audit, or that the Circuit Court reserved ruling on whether it would do so "based on the findings of the audit." 2018 Order, § 3. There is likewise no dispute the Partnership did

not maintain a physical inventory, and so Eric Hansen of Eide Bailly, LLP, combed through nearly 2,000 pages of documents in order to create his reports and to “recreate what was produced, what was sold, and what the ending inventory should have been.” Tr. 27:11-16. Similarly, there is no dispute the Circuit Court found Mr. Hansen “to be the most credible on the subject of [crop] inventory,” and adopted his “half-full” approach for the Partnership’s inventory, which was a major point of contention. Finding of Fact, ¶¶ 19-20. Moreover, South Dakota law obligates partners to share equally in expenses, and a partner is entitled to “repayment for reasonable compensation for services rendered in winding up the business of the partnership.” SDCL § 48-7A-401(h).

Tim and Steve take no issue with the foregoing, but rather question Kelly’s reasoning for obtaining the audit, and also by pointing out that they, too, retained an expert. However, unlike Kelly, Tim and Steve never sought authority from the Circuit Court to conduct an audit, and the Circuit Court specifically credited and relied on substantive opinions from Kelly’s expert. Accordingly, the comparison is superficial. Further, Tim and Steve also sought an accounting in their Answer. SR. 16-20. Given the state of the Partnership’s records, the audit was an inevitable expense that was needed to windup the Partnership. Thus, the Court should conclude the Circuit Court abused its discretion when it refused to apportion the costs of the audit among the partners.

G. The Circuit Court Erred in its Valuation of Expenses Allocated to Kelly

The Court should conclude the Circuit Court committed clear error in its valuation of Partnership expenses allocated to Kelly. *Priebe*, 1996 S.D. 136, at ¶ 8. Specifically, Kelly was required to pay a total of \$29,566.00 for expenses. Finding of Fact, ¶ 29. However, when compared to the entries on Exhibit SS, which the Circuit Court relied

upon for calculating these expenses, there is no way to arrive at that figure. Rather, at most, the entries allocated to Kelly yield a total of \$12,448.70, which leaves a balance of \$17,117.30 in unexplained expenses.

Tim and Steve contend that because the aggregate of all line items offered on Exhibit SS adds up to \$44,866.15, the Circuit Court could not have committed error by awarding any amount up to that figure. Of course, the Circuit Court is under no obligation to accept or credit a party's evidence simply because it is offered, and here the Circuit Court specifically found Tim and Steve failed to substantiate a number of line items on Exhibit SS. Tr. 403:24 – 404:2 (excluding lines 10, 14, 15, and 16 from Exhibit SS, and arriving at a total of \$29,566); Finding of Fact, ¶ 29 (reiterating this \$29,566 figure); Exhibit 1 (line 40); *see also People ex rel. D.A.J.*, 2008 S.D. 92, ¶ 18, n.3, 757 N.W.2d 70, 75 (“Oral findings may be referenced to clarify a trial court's written findings if there is no discrepancy”).

Yet, when those excluded line items are subtracted from the total on Exhibit SS—along with the first two entries for fertilizer, which the Circuit Court separately allocated to Kelly in Finding of Fact No. 28 (and line 39 of Exhibit 1)—the remaining total equals \$12,448.70. Therefore, the Circuit Court committed clear error by allocating an additional \$17,117.30 in unknown expenses to Kelly. *Eagle Ridge*, 2013 S.D. 21, at ¶ 12. Thus, the Circuit Court should be reversed.

III. The Circuit Court Erred When it Denied Kelly's Post-Trial Motion to Enforce the Judgment and the Parties' Negotiated "Cash Default" Provision

The 2018 Order directed the parties to hold a private auction to distribute a number of Partnership assets. The Circuit Court granted leave for the parties to stipulate to the auction's terms, and it required the parties to keep track of any real and personal

property obtained during the auction “along with all other partnership assets received through other arrangements (agreements, settlements, further order of the court or otherwise)[.]” 2018 Order, § 4.b. Tim and Steve do not dispute the “cash default” provision was among the stipulated auction terms in accordance with the Circuit Court’s directive.

Tim and Steve also do not dispute their failure to tender the equalization payment for over 90 days following entry of the Judgment. This is well-beyond the 30-day waiting period before a judgment becomes enforceable, SDCL § 15-6-62(a), and it is undisputed the equalization payment was not belatedly transmitted until after Kelly filed his motion to enforce the “cash default” clause. Instead, Tim and Steve offer a variety of excuses that are not born out by any citation to the record, and which are not exceptions provided for in the auction terms or in any order of the Circuit Court.

Ultimately, the Circuit Court denied Kelly’s motion, although its rationale is not clear from the record. The Circuit Court did not, for example, conclude the parties misconstrued the 2018 Order in stipulating to the terms of the private auction, nor did it conclude Kelly’s reading of the “cash default” provision was incorrect. Rather, it appears the Circuit Court found Kelly was required to give Tim and Steve notice of their obligation to make the equalization payment prior to seeking redress. Tr. 11:12-22.

The Circuit Court’s decision is a conclusion of law that is subject to de novo review. *Wichman v. Shabino*, 2014 S.D. 45, ¶ 5, 851 N.W.2d 202, 203; *Cont’l Grain Co. v. Brandenburg*, 1998 S.D. 118, ¶ 13, 587 N.W.2d 196, 199. Here, however, neither the cash default provision, nor the Circuit Court’s Judgment, contains such a “notice requirement.” Instead, the Circuit Court’s Judgment obligating Tim and Steve to make

the equalization payment to Kelly became effective after 30 days, and Tim and Steve failed to make the payment by that time (or for several more months). Nothing more was required to invoke the “cash default” provision. Consequently, the Circuit Court erred by interjecting additional requirements. Thus, the 2024 Order must be reversed, and this Court should conclude Kelly is entitled to receive the Holtus property with the equalization payment recalculated to account for its tax assessed value.

IV. The Circuit Court Did Not Err in its Valuation of Partnership Grain

By Notice of Review, Tim and Steve contend the Circuit Court committed clear error its valuation of Partnership corn and oats. *Priebe*, 1996 S.D. 136, at ¶ 8. The Circuit Court concluded Tim and Steve received \$446,299.00 and \$101,949.00 in Partnership corn and oats, respectively. Finding of Fact, ¶¶ 21, 22; see Tr. Ex. 1 (lines 16 and 17). Tim and Steve recognize the Partnership did not maintain records of its crop inventories. However, they contend that because Tim testified the Partnership had no corn or oats on hand at the beginning of 2014, the Circuit Court clearly erred by relying on any evidence to the contrary. The Court should reject this theory.

For context, the 2014 inventory starting point was based on what information was available, and the experts for both parties used that starting date. Recreating the Partnership’s inventory was an onerous task given its lack of records, as Mr. Hansen reviewed nearly 2,000 pages of Partnership records to formulate his opinions. Tr. 24:14-24. With respect to the Partnership’s grain inventory, Mr. Hansen explained he reviewed various data points, such as the Partnership’s financial records, its sales and production records, its storage capacity facilities (*i.e.*, grain bins, a Quonset, grain bags), its USDA records, its practice of feeding certain stocks to cattle, and so on. Tr. 27:11-28:7 (discussing corn); 37:9-12 (discussing oats). Mr. Hansen also took into consideration the

Partnership's practices with respect to storing grain for up to several years at a time depending on the market. Tr. 29:7-23.

Mr. Hansen then created two inventory models, one based on the scenario that the Partnership's inventory started off "full" in 2014, and one based on the scenario that it was "half-full." Tr. 29:24-30:4. Mr. Hansen explained the "half-full" model was likely too low, at least with respect to the oat inventory, because starting at that point would have yielded a negative inventory number ahead of the 2016 harvest, which is impossible. Tr. 37:12-17; Tr. 12 (Figure 7). That said, Mr. Hansen then carried the data forward to add in grains subsequently produced, less what was sold or used, which could be determined based on the Partnership's financial records for a given year. Tr. 30:20-24. This process was repeated each year. Tr. 31:8-11. Mr. Hansen's supplemental report details this process and sets forth the projected values for the Partnership's grain inventories. Tr. 37:23-38:6; Tr. Ex. 12 (Figure 9).

In contrast, Tim and Steve's expert, Mr. DeRouchey, never performed this type of inventory analysis before. Tr. 335:21-23. Rather, he merely criticized Mr. Hansen's work and was never even asked to provide an opinion on the inventory at all. Tr. 337:23-25. In fact, counsel for Tim and Steve remarked that "I'm not even believing that necessarily DeRouchey's models are correct." Tr. 62:24-25. Unsurprisingly, then, the Circuit Court did not find his opinions particularly persuasive.

For his part, Tim testified the Partnership did not have any grain inventory on hand entering 2014. Tr. 207:2-5. Tellingly, Tim offered no support for this contention, and Tim and Steve note that even Mr. DeRouchey believed the Partnership had grain on hand going into 2014. Appellees' Brief, 30. Kelly, too, disputed Tim's testimony on this

point, explaining the Partnership would never deplete all of its grain because the Partnership's livestock need to be fed and the following year may not be productive. Tr. 384:8-17. And, as noted with Mr. Hansen's report, the "half-full" inventory starting point in 2014 was likely too low based on the Partnership's inputs and outputs in the years that followed, and so beginning with an even lower starting point in 2014 would have not squared with the data.


Ultimately, the parties disagreed over the Partnership's inventory in 2014, and they presented competing evidence. Tim's self-serving and forensically unsupported testimony was far from "[t]he only concrete evidence presented" on this point, Appellees' Brief, 29, and he was motivated to drive down the values of any assets assigned to him or Steve. Regardless, the Circuit Court found Mr. Hansen was the most credible source on this topic, and the Circuit Court's findings on the value of the Partnership's corn and oat inventories are based on its assessment of all the evidence adduced at trial. The Court should conclude based on its review of the entire record that it is "not left with a definite and firm conviction that a mistake was made." *Eagle Ridge*, 2013 S.D. 21, ¶ 24. Thus, the Circuit Court should be affirmed on this issue.

CONCLUSION

The Circuit Court should be reversed for any or for all of the aforementioned reasons. However, the Circuit Court did not commit clear error with respect to its valuation of Partnership corn and oats, and the Circuit Court should be affirmed on that point raised in the Notice of Review.

Dated at Sioux Falls, South Dakota, this 17th day of January, 2025.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Reply Brief of Appellant complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 365, this Reply Brief contains 4,891 words and 25,062 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Reply Brief is typeset in Times New Roman (12 points) and was prepared using Microsoft Word 365.

Dated at Sioux Falls, South Dakota, this 17th day of January, 2025.

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CERTIFICATE OF SERVICE


The undersigned hereby certifies that the foregoing "Reply Brief of Appellant" was filed electronically with the South Dakota Supreme Court and that the original was filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on the 17th day of January, 2025.

The undersigned further certifies that an electronic copy of "Reply Brief of Appellant" was served electronically to the attorneys set forth below, on the 17th day of January, 2025:

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